Petition

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

COLVILLE CONFEDERATED TRIBES, *Petitioners,*

v.

BOYD WALTON, JR., *et ux, et al.*, and THE STATE OF WASHINGTON, *Intervenor, Respondents.*

UNITED STATES OF AMERICA, *Respondents,*

v.

WILLIAM BOYD WALTON, *et ux,* and THE STATE OF WASHINGTON, *Respondents.*

UNITED STATES OF AMERICA, *Respondents,*

v.

WILLIAM BOYD WALTON, *et ux,* and THE STATE OF WASHINGTON, *Respondents.*

COLVILLE CONFEDERATED TRIBES, *Petitioners,*

v.

BOYD WALTON, JR., *et ux, et al.*, and THE STATE OF WASHINGTON, *Respondents.*

UNITED STATES OF AMERICA, *Respondents,*

v.

WILLIAM BOYD WALTON, *et ux, et al.*, and THE STATE OF WASHINGTON, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

WILLIAM H. VEEDER, *Attorney*
COLVILLE CONFEDERATED TRIBES

Suite 920
818 18th Street, N.W.
Washington, D.C. 20006
(202) 466-3890

FRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

QUESTIONS PRESENTED

(a) Congress having authorized the Secretary of the Interior, by 25 U.S.C. 381, to prescribe rules and regulations "*to secure a just and equal distribution*" *of water* "*among the Indians residing*" on reservations; (b) Congress having further provided in 25 U.S.C. 381, respecting its mandate that water be distributed "among the Indians residing" on reservations, that ". . . no other appropriation of water by any riparian proprietor shall be authorized or permitted to the damage of any other riparian proprietor. . . ." and (c) the Secretary of the Interior having failed to prescribe rules and regulations, as provided by 25 U.S.C. 381, these questions are presented:

1. Whether, Congress having retained amendatory authority over the distribution of water on Indian reservations and having restricted the distribution of water "among the Indians residing" on the reservations, the Court of Appeals could properly decide that Indian allottees may transfer with their allotments to non-Indians reserved rights to the use of water, thus precluding a just and equal distribution of water "among the Indians residing" on the reservations.

2. Whether, by reason of the discretionary power in the Secretary pursuant to 25 U.S.C. 381 to distribute water "among the Indians residing" on the reservations, the Court of Appeals could properly substitute its will for that of the Secretary and

(a) declare, without a scintilla of evidence on the subject, that an allocation of water on the basis of irrigable acreage among Indians residing on a reservation is identical with and constitutes a just and equal distribution of water among Indians, as required by 25 U.S.C. 381;

(b) declare that the Indian allottee may convey to a non-Indian rights to the use of water measured by the extent that the Indians had exercised rights prior to the transfer to a non-Indian, though the trial court had found that the Indians had not exercised their rights prior to the sale of their lands to non-Indians;

(c) declare that the Indian allottee may convey with his allotment to a non-Indian a reserved right to the use of water measured by irrigable acres and that the non-Indian would be entitled to participate ratably, when there is insufficient

water, on the basis of the irrigable acreage in the watershed; provided, nevertheless, that the non-Indian would lose the rights conveyed by the Indian allottee to the extent that those rights were not exercised with due diligence, the record clearly showing that successive non-Indian owners — not the Respondents — had not exercised any rights to the use of water on the allotments for a period of at least twenty (20) years subsequent to the time when title passed out of the Indian allottees and prior to the time that Respondents acquired the former allotments; and

(d) decide that the Indian allottee could transfer to a non-Indian purchaser a priority to rights to the use of water as of the date the reservation was created.

3. Whether, by reason of the fact that Congress considered, when it enacted 25 U.S.C. 381, the transferability of Indian rights to non-Indians and rejected it by retaining for the Indians on the reservation a right to participate in the available supply of water on a just and equal basis, the Court of Appeals committed plain and serious error having determined, contrary to the express language in 25 U.S.C. 381 that Congress had not considered "the transferability of reserved water rights"[1] and undertook, contrary to the will of Congress, "To . . . determine what Congress would have intended had it considered [transferability]. . . ."[2]

4. Whether the courts throughout western United States may properly assume the responsibility of allocating water on the basis of irrigable acreage when adherence to that concept of water allocation is not only an invasion of the authority of the Legislative and Executive Branches of the Government, but frequently is the very essence of bad water management.

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[1] Appendix B to this Petition, p. 15a, Slip Opinion, June 1, 1981, Colville v. Walton, United States Court of Appeals For the Ninth Circuit.

[2] *Ibid.*

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Colville Confederated Tribes, Petitioners, respectfully petition the Court for a Writ of Certiorari to review the Judgment entered June 1, 1981, by the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The Opinion of the United States District Court for the Eastern District of Washington is reported as *Colville Confederated Tribes, Plaintiff,* v. *Boyd Walton, Jr., et ux, et al., Defendants, State of Washington, Defendant-Intervenor,* Civil No. 3421; *United States of America, Plaintiff,* v. *William Boyd Walton, ut ux, et al., and the State of Washington, Defendants,* Civil No. 3831, in 460 F.Supp. 1320 (U.S.D.C. E.D. Wash. 1978), and is reproduced in the Appendix to this Petition for Certiorari. The Judgment, entered by the United States District Court for the Eastern District of Washington, on February 9, 1979, the Memorandum Opinion of February 9, 1979, the amendment to the February 9, 1979 Judgment of April 2, 1979, and the amendment to the amended February 9, 1979 Judgment, entered March 3, 1981, are reproduced in the Appendix to this Petition for Certiorari.

The Opinion of the United States Court of Appeals, entered August 20, 1980, withdrawn and replaced, *Colville Confederated Tribes, Plaintiffs-Appellants,* v. *Boyd Walton, Jr., et ux, et al., Defendants-Appellees, and State of Washington, Intervening Defendant-Appellee,* Civil No. 79-4297; *United States of America, Plaintiff-Appellee,* v. *William Boyd Walton, et ux, Defendants-Appellants, and State of Washington, Defendant,* Civil No. 79-4309; *United States of America, Plaintiff-Appellee,* v. *William Boyd Walton, Jr., et ux, Defendants, and State of Washington, Defendant-Appellee,* No. 79-4383; is reproduced in the Appendix to this Petition for Certiorari.

The Opinion of the United States Court of Appeals, entered June 1, 1981, *Colville Confederated Tribes, Plaintiff-Appellant,* v. *Boyd Walton, Jr., et ux, et al., Defendants-Appellees, and*

State of Washington, Intervening Defendant-Appellee; United States of America, Plaintiff-Appellee, v. *William Boyd Walton, et ux, Defendants-Appellants, and State of Washington, Defendant; United States of America, Plaintiff-Appellee,* v. *William Boyd Walton, Jr., et ux, Defendant, and State of Washington, Defendant-Appellant,* Nos. 79-4297, 79-4309 and 79-4383, is reproduced in the Appendix to this Petition for Certiorari.

JURISDICTION

The Judgment of the Court of Appeals for the Ninth Circuit, to which this Petition is directed, was entered June 1, 1981.[3] That June 1, 1981 Judgment replaced the earlier Judgment entered by the Court of Appeals on August 20, 1980, predicated upon petitions for rehearing, which were granted.[4]

This Petition for Certiorari is filed within ninety (90) days after June 1, 1981.

The Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Constitution are:

"*Article I, Section 8, Clause 3:*

"The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes. . . ."

"*Article IV, Section 3, Clause 2:*

"The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."

The pertinent congressional enactment is the General Allotment Act of February 8, 1887, Ch. 119, Section 7 (28 Stat. 390); 25 U.S.C. 381:

"381. Irrigated lands; regulation of use of water.

"In cases where the use of water for irrigation is necessary to

[3] Appendix B to this Petition, p. 3a, Slip Opinion, June 1, 1981, Colville v. Walton, United States Court of Appeals for the Ninth Circuit.

[4] Appendix C to this Petition, p. 25a, Slip Opinion, August 20, 1980, withdrawn and replaced, Colville v. Walton, United States Court of Appeals for the Ninth Circuit.

render the lands within any Indian reservation available for agricultural purposes, the Secretary of the Interior is authorized to prescribe such rules and regulations as he may deem necessary to secure a just and equal distribution thereof among the Indians residing upon any such reservation; and no other appropriation or grant of water by any riparian proprietor shall be authorized or permitted to the damage of any other riparian proprietor."

STATEMENT

Introduction

Involved in these cases are conflicts between Petitioners Colville Confederated Tribes, who occupy the Colville Indian Reservation, State of Washington, and non-Indian Respondents Waltons over rights to the use of water reserved for that reservation. Respecting those conflicts, the Court of Appeals for the Ninth Circuit said this:

> "This case presents an appropriate vehicle for the Supreme Court to give guidance and stability to an area of great unrest and uncertainty in Western water and land law."[5]

Underscoring the need for review, that Court continued:

> "A definitive resolution is overdue. The magnitude of the problem cannot be overstated."[6]

Presented here are classic examples of irreconcilable and ongoing conflicts among Indians, non-Indians, the states and the United States over reserved rights to the use of water. Those conflicts are endemic. They exist on all Indian reservations throughout the arid and semi-arid regions of western United States. Indian Tribes are seeking to protect their rights to the use of water from violation by non-Indians who occupy portions of their reservations.

Here, the Colville Confederated Tribes deny the claims of the non-Indian Respondents Waltons to share in the rights to use the drastically short supply of water reserved for the Tribes in No

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[5] Appendix B to this Petition, p. 23a, note 18, Slip Opinion, June 1, 1981.

[6] *Ibid.*

Name Creek. Plate No. 1 (Appendix I), Colville Exhibit No. 1, is a map to scale entitled "Index Map of the No Name Creek Basin." Appearing there, among other things, is the watershed of No Name Creek. It is semi-arid and ". . . the use of water for irrigation is necessary to render the lands within . . ." that watershed ". . . available for agricultural purposes . . ."[7] as contemplated by Congress in 25 U.S.C. 381. No Name Creek likewise appears on Plate No. 1. It is a non-navigable stream that rises and flows its entire length within the Colville Indian Reservation. It terminates in Omak Lake, a closed, highly saline body of water, which is also entirely within the Colville Indian Reservation.

The rights to the use of the surface and groundwaters of No Name Creek are the res or subject matter of these proceedings. As will be observed on Plate No. 1, No Name Creek arises on Colville Allotment 892 and traverses the former allotments, now occupied by non-Indian Respondents Waltons. It leaves the lands of the Respondents, enters Colville Allotments 901 and 903 and enters Omak Lake.

Non-Indian Respondents Waltons are in a position to seize and have seized and converted to their own use the entire flow of No Name Creek to the irreparable damage of Petitioners Colville Confederated Tribes.

Opinion[8] And Final Judgment Of Trial Court[9]

On September 15, 1970, the Petitioners initiated the case of *Colville* v. *Walton*. They invoked the jurisdiction of the United States District Court for the Eastern District of Washington pursuant to 28 U.S.C. 1362.[10] By that action, Petitioners sought to

[7] 25 U.S.C. 381.

[8] Appendix D to this Petition, p. 45a, Colville v. Walton, 460 F.Supp. 1320 (U.S.D.C. E.D. Wash. 1978).

[9] Appendix E to this Petition, p. 71a, February 9, 1979 Judgment, Colville v. Walton, United States District Court, Eastern District of Washington.

[10] "§1362. Indian tribes.

"The district court shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly

enjoin the non-Indian Respondents from causing them irreparable damage through the seizure and utilization of all of the meager water supply of No Name Creek.

The State of Washington intervened as a defendant on behalf of the Respondents. When the Tribes requested the Department of Justice to intervene on behalf of the Tribes, it refused to do so. Rather, that Department initiated the case of *United States* v. *Walton, State of Washington, Defendants.* There, it was asserted by the Department of Justice, among other things, that the Secretary of Interior has exclusive jurisdiction to administer all of the water resources on the Colville Indian Reservation. Additionally, the Justice Department sought to have declared null and void the Certificate of Water Right issued by the State of Washington to Respondents Waltons. The Department of Justice likewise sought to enjoin the State of Washington from issuing permits throughout the entire Colville Indian Reservation.

The cases of *Colville* v. *Walton* and *United States* v. *Walton* were consolidated for trial.

Status of the Department of Justice throughout the proceedings — in the trial on the merits and on appeal — was and is anamolous.[11]

Those consolidated cases came on for trial on the merits. All of the issues presented were vigorously contested by the parties. The Respondents Waltons were supported by the State of Washington and, very markedly, by the Department of Justice. The relationship between Petitioners Tribes and the Department of Justice was summarily stated by the Court of Appeals in its June 1, 1981 Opinion, to which this Petition is directed.[12]

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recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States."

[11] Appendix B to this Petition, p. 8a, note 6, Slip Opinion, June 1, 1981:

"The United States filed an appeal from the decision and the Tribe moved 'not to be bound' by any ruling on *U.S.* v. *Walton,* No. 79-4619. The United States has since dropped its appeal and we deny the Tribe's motion."

[12] See, note 11, *supra.*

There was filed by the trial court, on October 25, 1978, its Memorandum Opinion.[13] On February 9, 1979, the trial court entered its Judgment[14] and simultaneously issued a Supplemental Memorandum Opinion.[15]

The trial court (a) sustained the Tribes' claim to *Winters* reserved rights to the use of water in No Name Creek with a priority of at least July 2, 1872, the date when the Colville Indian Reservation was created;[16] (b) denied Respondents' contention that the Tribes' *Winters* reserved rights could be transferred to them;[17] and (c) affirmed the Certificate of Water Right issued by the State of Washington to the Respondents declaring, however, that the Tribes' *Winters* reserved rights were prior and paramount to the Respondents' rights claimed pursuant to state law.[18]

Finally, the court declared that the State of Washington had jurisdiction to issue permits to appropriate rights to the use of water by non-Indians throughout the Colville Indian Reservation ". . . subject to existing rights."[19]

Clearly Erroneous And Contradictory Findings Of The Trial Court Most Relevant Here

Respecting the lands occupied by Respondents Waltons (Plate No. 1, Appendix I), the trial court correctly found that "The former Indian allottees had not irrigated these lands."[20] Clearly contradicting its last-quoted finding, the trial court declared, in substance, that the allottees had irrigated thirty-two

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[13] Appendix D to this Petition, p. 45a.

[14] Appendix E to this Petition, p. 71a.

[15] Appendix F to this Petition, p. 77a, February 9, 1979 Memorandum Opinion, Colville v. Walton, United States District Court, Eastern District of Washington.

[16] Appendix D to this Petition, p. 50a.

[17] *Ibid.*, at p. 54a-55a.

[18] *Ibid.*, at p. 59a-60a.

[19] *Ibid.*, at p. 62a.

[20] *Ibid.*, at p. 47a.

(32) acres of land prior to the sale of their allotments.[21] That clearly erroneous finding, respecting the non-existent irrigation of thirty-two (32) acres of land, is all pervasive in the trial court's Opinion and in the Opinions of the Court of Appeals.

Continuing to contradict its own findings, the trial court, in error, found that:

> "The allotments now owned by the [Respondents] Waltons passed from Indian ownership in 1942."[22]

Diametrically opposed to the finding that the title to the former allotments passed out of Indian ownership in 1942, the trial court correctly found, as follows, in regard to each of the former allotments now occupied by Respondents Waltons: As to former Allotment 2371,[23] the trial court found that it went out of trust status in 1917 and out of Indian ownership in 1921. Relative to former Allotment 894,[24] the trial court correctly found that it went out of "trust" status in 1917 and out of Indian ownership in 1923. Respecting former Allotment 525,[25] the trial court correctly found that it went out of trust status and Indian ownership in 1925.[26]

The Court of Appeals, in its withdrawn and replaced August 20, 1980 Opinion,[27] noted the serious errors by the trial court respecting (a) the dates when title to the Respondents' three (3) former allotments passed out of Indian ownership and (b) when water was first used on those former allotments, and said this:

> ". . . the earliest diversion of water for his [Respondents'] land was made by his grantor between 1942 and 1948."[28]

It is an uncontested fact that, for a period of more than 20 years subsequent to the time when the former allotments now occupied

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[21] *Ibid.*, at p. 57a.

[22] *Ibid.*, at p. 47a.

[23] See, Plate No. 1, Appendix I to this Petition.

[24] See, Plate No. 1, Appendix I to this Petition.

[25] See, Plate No. 1, Appendix I to this Petition.

[26] Appendix D to this Petition, p. 67a, paras. 22(a), (b), (c).

[27] Appendix C to this Petition, p. 25a, Slip Opinion, August 20, 1980, withdrawn and replaced.

[28] *Ibid.*, at p. 35a, note 17.

by Respondents passed out of Indian ownership, they *were not* irrigated, as the appellate court recognized.

Adoption by the Court of Appeals of the factual errors, upon which the Colville Confederated Tribes, in part, predicated their appeal, is serious by reason of the rationale of the Opinion to which this Petition for a Writ of Certiorari is directed.

All of the parties appealed the various aspects of the Opinion and the Judgment of the trial court, which have been reviewed above.

Opinion Of August 20, 1980 — "Withdrawn And Replaced"[29]

On August 20, 1980, the Court of Appeals for the Ninth Circuit, referring to the trial court's Opinion of October 25, 1978,[30] adopted that Opinion and added its own analysis.[31]

"The primary issue," the Court of Appeals stated, in regard to *Colville* v. *Walton,* was whether non-Indian Respondents Waltons ". . . acquired Indian reserved water rights with . . . [their] allotments."[32] Predicated upon the trial court's Opinion and its own analysis of the law, the Court of Appeals, in its August 20, 1980 Opinion, concluded that non-Indian Respondents did not succeed to Colville reserved rights for these reasons:

> ". . . (1) no water was originally reserved for non-Indian use and (2) the history and purpose of the Allotment Act demonstrates that Congress would not have intended non-Indians to acquire reserved rights."[33]

The Court of Appeals, in its withdrawn and replaced August 20, 1980 Opinion, affirmed the trial court's Opinion that (a) although Congress had not so authorized it, a right to the use of water within the Colville Indian Reservation could be acquired by a non-Indian through the mere diversion of water by the non-

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[29] Appendix C to this Petition, p. 25a, Slip Opinion, August 20, 1980, withdrawn and replaced.

[30] Appendix D to this Petition, p. 45a.

[31] Appendix C to this Petition, p. 30a, Slip Opinion, August 20, 1980, withdrawn and replaced.

[32] *Ibid.*, at p. 31a.

[33] *Ibid.*, at p. 31a.

Indian and (b) incongruously, the non-Indian user was not required to comply with state law but could acquire a vested right simply by the diversion of water, although the law of the state is explicit that rights could be acquired only by compliance with state procedures.[34]

Petitions for rehearing were filed in regard to the August 20, 1980 Opinion by all parties, with the exception of the Petitioners.

Court Of Appeals' Opinion, June 1, 1981[35]

A complete turnabout was accomplished by the Court of Appeals. In its June 1, 1981 Opinion, to which this Petition for a Writ of Certiorari is directed, the Court of Appeals did this: It granted the petitions for rehearing. It withdrew and replaced the August 20, 1980 Opinion. As stated, the Court of Appeals, by its August 20, 1980 Opinion, affirmed the trial court's Opinion.[36] On June 1, 1981, the Court of Appeals reversed in part the decision of the trial court, affirmed that decision in part, and remanded.[37]

In summary, the Court of Appeals, by its June 1, 1981 Opinion, made the following rulings, among others:

1. *State Jurisdiction Denied*: The Court of Appeals declared that the State of Washington ". . . has no power to regulate water in the No Name system. . . ."[38] Predicated upon that concept, the Court of Appeals declared that ". . . the permits [issued to Respondents] are of no force and effect."[39] Rationale of the Court of Appeals on the subject of state jurisdiction was summarized in these terms:

> "We hold that state regulation of water in the No Name system was pre-empted by the creation of the Colville Reservation."[40]

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[34] See, the Revised Code of the State of Washington, 90.01, *et seq.*

[35] Appendix B to this Petition, p. 3a, Slip Opinion, June 1, 1981.

[36] Appendix C to this Petition, p. 43a, Slip Opinion, August 20, 1980, withdrawn and replaced.

[37] Appendix B to this Petition, p. 23a, Slip Opinion, June 1, 1981.

[38] *Ibid.*, at p. 19a.

[39] *Ibid.*, at p. 19a.

[40] *Ibid.*, at p. 20a, para. 13.

Continuing, the Court of Appeals referred to the Court's decision of *Federal Power Commission* v. *Oregon*[41] and held that:

> ". . . water use on a federal reservation is not subject to state regulation absent explicit federal recognition of state authority. *** Thus, in creating the Colville Reservation, the federal government pre-empted state control of the No Name system."[42]
>
> Cognizance was likewise taken of the Tribes' inherent power of self-government. Left undetermined, however, by the appellate court is whether regulation of water resources on the Colville Indian Reservation ". . . resides exclusively in the tribe or the federal government, or whether it may be exercised by them jointly. . . ."[43]
>
> In the phase of the Opinion respecting the interpretation of 25 U.S.C. 381,[44] the Court of Appeals declared:
>
> "The only mention of water rights in the Allotment Act suggests continued federal control. 25 U.S.C. §381."[45]

2. *Tribes' Winters Reserved Rights May Be Used For Any Purpose*: In explicit terms, the Court of Appeals declared that the Colville Confederated Tribes may ". . . determine how to use reserved. . ." waters, to which they are legally entitled.[46] In that regard, the Court of Appeals added that the uses must be ". . . consistent with the general purpose. . ." for which the reservation was created.[47] The Court further declared that the Colville Indian Reservation was to provide ". . . a homeland for the [a] survival and [b] growth of the Indians and [c] their way of life."[48] Those purposes, said the Court of Appeals, are ". . . broad. . . and must be liberally construed."[49]

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[41] 349 U.S. 435 (1955).

[42] Appendix B to this Petition, p. 21a, Slip Opinion, June 1, 1981.

[43] Ibid., at p. 20a, para. 12.

[44] See, p. 21, *infra*.

[45] Appendix B to this Petition, p. 22a, note 17, Slip Opinion, June 1, 1981.

[46] *Ibid.*, at p. 13a, para. 7.

[47] *Ibid.*

[48] *Ibid.*

[49] *Ibid.*, at p. 10a, para. 6.

Additionally, the Court declared that the rights to the use of water reserved for the Colville Indian Reservation were of such character that the Tribes may ". . . maintain themselves under changed circumstances."[50]

Stressed by the Court of Appeals is the fact that the rights to the use of water for the Colville Indian Reservation were ". . . for the Indians, not for the benefit of the government."[51]

Criteria For Measuring Winters Reserved Rights Of The Tribes

Having concluded that the Colvilles could exercise their *Winters* reserved rights for any purpose, the Court of Appeals established a method pursuant to which those rights could be measured.

Adopting the rationale of the Court's decision in *Arizona* v. *California*,[52] the Court of Appeals declared that:

> ". . . when the Colville reservation was created, sufficient appurtenant water was reserved to permit irrigation of all practicably irrigable acreage on the reservation."[53]

The Court of Appeals did not, however, limit the Colville Confederated Tribes to water for agricultural purposes.

Lahontan Cutthroat Trout Fishery,[54] Referred To By The Court Of Appeals As The Omak Lake Fishery

Cognizance was taken by the Court of Appeals that the Tribes ". . . traditionally fished for both salmon and trout."[55] For that reason, the Tribes' ". . . access to fishing grounds was one purpose for the creation of the Colville Reservation."[56] Accordingly, the Court of Appeals upheld the Tribes' claims to rights in No Name Creek for the re-establishment of fisheries

[50] *Ibid.*, at pp. 10a and 11a.

[51] *Ibid.*, at p. 10a.

[52] 373 U.S. 546, 600-601 (1963).

[53] Appendix B to this Petition, p. 11a, para. 6, Slip Opinion, June 1, 1981.

[54] *Ibid.*, at p. 12a.

[55] *Ibid.*, at p. 11a.

[56] *Ibid.*, at p. 12a.

destroyed by the construction of dams across the Columbia River.[57] There was thus decreed to the Colville Confederated Tribes *Winters* rights that could be exercised for any beneficial purpose and measured by agricultural and fishery water requirements.

Transferability Of Colville Winters Reserved Rights To Non-Indians

Rationale for the radical reversal of the trial court's Opinion[58] and the Court of Appeals' own earlier opinion remains obscure. Having declared that Indian rights generally may not be diminished or terminated without clear evidence of congressional will, the Court of Appeals said that:

> "Upon careful consideration, we conclude this principle supports the proposition that an Indian allottee may sell his right to reserved water."[59]

Without any congressional predicate, the Court of Appeals sought to establish in some detail the criteria pursuant to which the nature, measure and extent of Indian rights transferred to non-Indians could be determined.

The Measure Of Indian Rights Conveyed

A. Conveyance of quantities utilized by allottees

As reviewed,[60] the trial court found, predicated upon indisputable evidence, that "The former [Colville] Indian allottees had not irrigated these lands," now owned by Respondents Waltons. Thus, there was not before the Court of Appeals the issue of whether a non-Indian purchaser succeeds to Indian rights to the extent that they had been exercised by the Indian allottee before the sale of his allotment. Irrespective of that fact, the Court of Appeals, obviously by way of *dictum*, declared that:

> "The non-Indian successor acquires a right to water being appropriated by the Indian allottee at the time title passes."[61]

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[57] *Ibid.*

[58] See, p. 16, *infra*.

[59] Appendix B to this Petition, p. 16a, paras. (1)-9, 10, Slip Opinion, June 1, 1981.

[60] See, p. 6, *supra*.

[61] Appendix B to this Petition, p. 18a, paras. (2)-9, 10, Slip Opinion, June 1, 1981.

There is no rationale for that *dictum*. As will be emphasized, Congress alone has power to provide for the acquisition of Indian rights. Congress has not authorized an Indian allottee to sell a right to the use of water measured by the quantity of water that he has used or any other water right.

B. The measure of Indian rights passing with allotted lands

The Court of Appeals declared that the Indian *Winters* rights conveyed with an allotment to a non-Indian are to be measured on the basis of ". . . the number of irrigable acres he owns."[62] By way of example, the Court of Appeals declared that, if the allottee owns ten percent (10%) of the irrigable acres in a watershed, ". . . he is entitled to 10% of the water. . . ."[63] That conclusion, the Court of Appeals declared,

> ". . . follows from the provision for an equal and just distribution of water needed for irrigation."[64]

There is not a scintilla of evidence to establish that a "just and equal distribution" of a short supply of water can be accomplished by prorating the water on the basis of irrigable acreage. The concept would force the Colville allottees on Allotments 901 and 903 greatly to reduce their irrigated acreage to provide water for Respondents' irrigable acreage, which had never been irrigated before and which remained unirrigated for in excess of twenty (20) years after the property went out of Indian ownership.[65]

The Priority Transferred By Indian Allottees To Non-Indian Purchasers

An element of the appellate court's Opinion, that an Indian allottee transfers to a non-Indian water rights measured by irrigable acreage, is the concommitant proposition that the Indian allottee would transfer to the non-Indian purchaser a priority right ". . . as of the date the reservation was created."[66]

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[62] *Ibid.*

[63] *Ibid.*, at p. 17a.

[64] *Ibid.*

[65] See, Plate No. 2, Appendix J to this Petition.

[66] Appendix B to this Petition, p. 18a, paras. (2)-9, 10, Slip Opinion, June 1, 1981.

Importance of the investiture in a non-Indian of a priority as of the date when the reservation was created is incalculable. Where, as here, the water supply is insufficient to satisfy all of the valid claims of the Colvilles, the Court of Appeals declared that the amount of water should be "reduced proportionately" on the basis of Indian and non-Indian irrigable acreage within a watershed. That concept is disastrous. It would render uneconomic present Colville use and preclude future Indian development. As stated, in regard to Colville Allotments 901 and 903, their present water use would be sharply constricted, probably prohibited.[67]

Limitations Upon Rights To Which Non-Indians Succeed

It has been pointed out above that the Colville Indian allottees had not used water upon their allotments prior to the transfer of their lands to non-Indians.[68] Thus, there is no basis for the court's conclusion that there passed to the non-Indians from the Colville Indian allottees rights to the use of water to the extent that those rights had been exercised.

It was stressed by the Court of Appeals that the Indians could not lose their rights by non-use. That concept, said the Court of Appeals, does not pertain to non-Indians. On the subject, the Court of Appeals said that the non-Indian must appropriate and utilize the waters acquired from the Indian allottee ". . . with reasonable diligence after the passage of title."[69] Failure thus to exercise the rights acquired from the Indian with due diligence will, said the court, result in the loss of the right ". . . to the non-Indian successor."[70]

As will be reviewed, the innovative concepts, respecting the transfer, use and management of Indian and non-Indian rights to the use of water advanced by the Court of Appeals, proceeding en-

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[67] *Ibid.* See, pp. 4, 13, *supra.*

[68] See, p. 6, *supra.*

[69] Appendix B to this Petition, p. 18a, paras. (2)-9, 10, Slip Opinion, June 1, 1981.

[70] *Ibid.*

tirely without a legislative base, present issues of transcendent importance throughout western United States. Those concepts give rise to this Petition for a Writ of Certiorari.

ARGUMENT

Reasons For Granting The Writ

Issues of Transcendent Importance to Western United States Remain Unresolved

There are presented here important questions of federal law, which have not been, ". . . but should be, settled by this court."[71]

Water is the lifeblood of the arid and semi-arid West. Controversies over it pervade all aspects of western history and western law. Those conflicts dominate the present and will govern the future of western United States. Resolution of them is an imperative necessity.

Irreconcilable conflict between the Tribes and the Respondents Waltons is the hallmark of their relationship. There is insufficient water in No Name Creek for the Tribes to irrigate from the No Name Creek system the lands within the Colville Irrigation Project.[72] Colville Exhibit No. 8, Plate No. 2, (Appendix J), graphically displays that project and the relationship between the lands of the Colvilles and the Respondents. Most assuredly, there is no water available in the No Name Creek system for the Respondents. The Respondents, having monopolized and polluted the waters of No Name Creek, precipitated the controversy here involved.[73] Pollution caused by the Respondents' dairy herd threatens the Colville Trout Fishery. Respondents polluted the only source of water available to the Colville Omache Lodge,

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[71] Rule 19(b), Rules of the Supreme Court.

[72] See, Plate No. 2. The Tribes have 228 irrigable acres with water for only 157 irrigated acres. To supply Colville Allotments 901 and 903 and the Colville Lahontan Cutthroat Trout Fishery, it is necessary to pump water from Colville Allotments 526 and 892 into the natural channel of No Name Creek for delivery down to Colville Allotments 901 and 903 and to the fishery, all of which appear on Plate No. 2 (Appendix J).

[73] Testimony of Mel Tonasket, T.R. Vol. II, pp. 214-215; 236.

which had been established by the Tribes for recreational purposes.[74]

Respecting the Indian-non-Indian conflict over rights to the use of water, sharply defined in these proceedings, the Court of Appeals stated that these cases provide

> ". . . an appropriate vehicle for the Supreme Court to give guidance and stability to an area of great unrest and uncertainty in Western water and land law."[75]

The appellate court did not overstate the situation presented when it declared that:

> "A definitive resolution [of the issues here presented] is overdue. The magnitude of the problem cannot be overstated."[76]

Contradictory Opinions Of The Court Below Demonstrate Its Dilemma; The Need For Review[77]

As reviewed, the Court of Appeals rendered antipodal decisions, relying in both upon identically the same statutes and the same decisions.[78] By its radical reversal of its August 20, 1980 Opinion by its June 1, 1981 decision, the Court of Appeals underscored the all-encompassing conflict in the arid and semi-arid regions of western United States respecting rights to the use of water. Those contradictory Opinions are reviewed below.[79]

[74] *Ibid.*, at pp. 212; 215; 251; 253. For testimony respecting the destruction of Colville operations on Colville Allotments 901 and 903 by diversions of Respondents, see testimony of Mary Ann Timentwa Sampson, T.R. Vol. II, pp. 316-325; 330; 335-337. Respecting the diversion and pollution of water, see T.R. Vol. VIII, testimony of Dr. David Koch, pp. 1692-1693; 1720-1721.

[75] Appendix B to this Petition, p. 23a, note 18, Slip Opinion, June 1, 1981.

[76] *Ibid.* See, p. 3, *supra.*

[77] See, pp. 8, 9, *supra.*

[78] See, note 79, below.

[79] Summary of contradictions by the Court of Appeals: There is reviewed in summary the total turnabout of the Court of Appeals in its interpretation of 25 U.S.C. 381, which provides for a just and equal distribution of a short water supply among Indians residing on reservations and, in effect, prohibits the transfer of rights that would damage

It is clear beyond question that the Court of Appeals has ignored this admonition repeatedly expressed by the Court:

". . . as a general rule . . . the powers confided by the Constitution . . . [to the Executive and Legislative Branches of

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Indian allottees who retained their reserved rights for their riparian lands.

A. *The Powers Decision: In denying the concept of transferability of Indian rights to non-Indians,* the Court of Appeals, in its withdrawn and replaced August 20, 1980 decision, cited *United States* v. *Powers,* 305 U.S. 527 (1939). Relative to the Court's Opinion, it stated:

"The *Powers* court expressly reserved the issue of transferability:

" 'We do not consider the extent or precise nature of respondents' [non-Indians'] rights in the waters.' "

See, Appendix C to this Petition, p. 35a, note 16, Slip Opinion, August 20, 1980, withdrawn and replaced.

B. *The Powers Decision:* In its June 1, 1981 Opinion, *sustaining the concept of transferability of Indian rights to non-Indians,* the Court of Appeals said this respecting *United States* v. *Powers*:

"It is settled that Indian allottees have a right to use reserved water."

See, Appendix B to this Petition, p. 15a, para. 8, Slip Opinion, June 1, 1981.

Presented by the Court of Appeals are two diametrically opposed interpretations of the Court's Opinion in *United States* v. *Powers.*

A. *The Ahtanum Decision: In denying the concept of transferability of Indian rights to non-Indians,* the Court of Appeals, respecting its earlier decision in *United States* v. *Ahtanum Irrigation District, et al.,* 236 F.2d 321 (CA 9, 1956), stated, in its withdrawn and replaced August 20, 1980 Opinion,

". . . this court . . . 'holds that white transferees of such fee patented Indian allotments were equally with individual allottees benefically entitled to distribution of the waters diverted for the Indian irrigation system.' *Id.* at 342. That reading was erroneous."

See, Appendix C to this Petition, p. 35a, note 16, Slip Opinion, August 20, 1980, withdrawn and replaced.

B. *The Ahtanum Decision: In sustaining the concept of transferability of Indian rights to non-Indians,* the Court of Appeals, in its June 1, 1981

the Government are not to be exercised by the Judiciary]. . . ."[80] (see p. 20 *infra* for citation)

Opinion, cited its *Ahtanum* decision as authority for the proposition that:

". . . non-Indian purchasers of allotted lands are entitled to 'participate ratably' with Indian allottees in the use of reserved water."

See, Appendix B to this Petition, p. 17a, paras. 9, 10, Slip Opinion, June 1, 1981.

The Court continued to ignore the explicit language of 25 U.S.C. 381, which retained for the Indians residing on the reservation rights to the use of water and prohibited any transfer of those rights that would preclude a just and equal distribution of a short water supply among the Indians on the reservation.

A. *Mattz* v. *Arnett, 412 U.S. 481, 504-505 (1972); Bryan* v. *Itasca County, 426 U.S. 373, 392-393 (1976): In denying the transferability of Indian rights to non-Indians,* the Court of Appeals, in its August 20, 1980, withdrawn and replaced Opinion, cited *Mattz* v. *Arnett* and *Bryan* v. *Itasca County* in support of this concept:

"Termination or diminution of Indian rights requires express legislation or a clear inference of Congressional intent from the surrounding circumstances and legislative history. * * * The Allotment Act does not provide for the transfer of Indian water rights to non-Indian allotment purchasers."

See, Appendix C to this Petition, pp. 32a-33a, Slip Opinion, August 20, 1980, withdrawn and replaced.

Ergo, said the Court of Appeals, "We conclude that Walton acquired no reserved water rights." *Ibid.*, p. 35a.

B. *Mattz* v. *Arnett* and *Bryan* v. *Itasca County: In sustaining the concept of transferability of Indian rights to non-Indians,* the Court of Appeals, in its June 1, 1981 Opinion, citing *Mattz* v. *Arnett* and *Bryan* v. *Itasca County,* said this:

"The general rule is that termination or diminution of Indian rights requires express legislation or a clear inference of Congressional intent gleaned from the surrounding circumstances and legislative history. * * * Upon careful consideration, we conclude this principle supports the proposition that an Indian allottee may sell his right to reserved water."

In arriving at its conclusions respecting the transferability of Indian *Winters* reserved rights to non-Indians, the Court of Appeals

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See, Appendix B to this Petition, p. 16a, paras. 9, 10, Slip Opinion, June 1, 1981.

Again, the Court of Appeals, citing identically the same cases and, indeed, using identically the same language, arrived at diametically opposed conclusions.

A. *25 U.S.C. 348: In denying the concept of transferability of Indian rights to non-Indians,* the Court of Appeals, in its August 20, 1980, withdrawn and replaced Opinion, said this:

"The available evidence indicates that Congress would have disapproved transferability as inconsistent with the purposes of the Allotment Act. * * *

"This is evidenced by the provision that allotted lands be held in federal trust for 25 years. 25 U.S.C. §348 (1976).

" * * *

"* * * It would have been inconsistent for Congress to deter non-Indian acquisition of allotments by imposing a federal trust and yet to encourage non-Indian acquisition by offering better water rights than were available to homesteaders. * * *

"We conclude that Walton acquired no reserved water rights."

See, Appendix C to this Petition, pp. 33a, 34a, 35a, Slip Opinion, August 20, 1980, withdrawn and replaced.

B. *25 U.S.C. 348: In sustaining the concept of transferability of Indian rights to non-Indians,* the Court of Appeals, in its June 1, 1981 Opinion, cited 25 U.S.C. 348 and said this:

"The district court's holding that an Indian allottee may convey only a right to the water he or she has actually appropriated . . . reduces the value of the allottee's right to reserved water. We think this type of restriction on transferability is a 'diminution of Indian rights' that must be supported by a clear inference of Congressional intent."

See, Appendix B to this Petition, p. 16a, paras. 9, 10, Slip Opinion, June 1, 1981.

It is manifest that the Court of Appeals failed to consider 25 U.S.C. 381 and 25 U.S.C. 348 as part of the same general enactment — the Allotment Act. Rather, the Court of Appeals considered those provisos entirely separate and apart, one from the other.

undertook to perform the functions of both the Legislative and Executive Branches of the Government.

Common sense dictates that a single standard for allocating short supplies of water — on the sole basis of irrigable acreage — ensures disaster. An irrigable-acreage allocation, where, as here, irrigable acres have no relationship to the meager supply of water in No Name Creek, results in each acre of land being entitled to a "teacup" of water — a totally useless and vacuous allocation.

A. *25 U.S.C. 381: In denying the concept of transferability of Indian rights to non-Indians,* the Court of Appeals, in its August 20, 1980, withdrawn and replaced Opinion, cited 25 U.S.C. 381, which is quoted at note 85, *infra*, and said this:

"This provision implies that water rights were held in federal trust and not allotted."

See, Appendix C to this Petition, p. 33a, note 13, Slip Opinion, August 20, 1980, withdrawn and replaced.

In arriving at that conclusion, the Court of Appeals recognized that the Secretary of Interior was empowered to make rules and regulations resulting in a "just and equal distribution" of a short water supply "among the Indians" residing on an arid or semi-arid reservation of the type characterized by the Colville Indian Reservation.

B. *25 U.S.C. 381: In sustaining the concept of transferability of Indian rights to non-Indians*, the Court of Appeals, having quoted that proviso in full in its June 1, 1981 Opinion, stated that there is "nothing" to suggest that Congress gave any consideration to the transferability of reserved Indian rights to non-Indians.

See, Appendix B to this Petition, p. 15a, para. 7, Slip Opinion, June 1, 1981.

Totally reversing its earlier August 20, 1980 Opinion and the Opinion of the district court, the Court of Appeals ignored the explicit language of 25 U.S.C. 381, which is an explicit consideration of the issue of the transferability of Indian rights and, having thus explicitly considered it, the Court of Appeals declared that those rights are not transferable to non-Indians.

[40] Kilbourn v. Thompson, 103 U.S. 168, 191 (1880).

Congress — Not The Courts — Has Plenary Power Over Indian Affairs [81] And Over Properties In Which The National Government Has An Interest[82]

From the inceptive moment of the Constitution, the plenary power of Congress over Indian affairs has been recognized.[83] Comparable power resides in the Congress over property rights in which the National Government holds an interest.[84]

Having quoted in full 25 U.S.C. 381,[85] the court below erred in saying:

> "There is nothing to suggest Congress gave any consideration to the transferability of reserved water rights."[86]

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[81] U.S. Const., Art. I, sec. 8, cl. 3:

"The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes. . . ."

[82] U.S. Const., Art. IV, sec. 3, cl. 2:

"The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."

[83] See, Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1881); Worchester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

[84] See, Antoine v. State of Washington, 420 U.S. 194 (1971); Seymour v. Superintendent, 368 U.S. 351 (1962); McClanahan v. Arizona Tax Comm'n., 411 U.S. 164 (1973); United States v. City and County of San Francisco, 310 U.S. 16, 29-30 (1939).

[85] 25 U.S.C. 381. Irrigated lands; regulation of use of water.

"In cases where the use of water for irrigation is necessary to render the lands within any Indian reservation available for agricultural purposes, the Secretary of the Interior is authorized to prescribe such rules and regulations as he may deem necessary to secure a just and equal distribution thereof among the Indians residing upon any such reservation; and no other appropriation or grant of water by any riparian proprietor shall be authorized or permitted to the damage of any other riparian proprietor."

[86] Appendix B to this Petition, p. 15a, para. 7, Slip Opinion, June 1, 1981.

The Court of Appeals contradicted its earlier withdrawn Opinion, there having quoted 25 U.S.C. 381, and declared correctly, it is believed, that:

> "This provision implies that water rights were held in federal trust and not allotted."[87]

In its June 1, 1981 Opinion, to which this Petition is directed, the Court of Appeals said this:

> "The only mention of water rights in the Allotment Act suggests continued federal control. 25 U.S.C. §381."[88]

Though that conclusion, it is believed, is imminently correct, the concept of "continued federal control" is contrary to the rationle of the Opinion that, when the lands pass out of Indian trust status, the National Government has no further interest.[89]

Congress Explicitly Limited The Distribution Of Water "Among the Indians residing" On The Colville Indian Reservation

Explicit language limited the distribution of water "among the Indians residing" on the Colville Indian Reservation. Under no circumstances is it permissible to interpolate the word "non-Indian" into 25 U.S.C. 381, as attempted by the Court of Appeals.[90]

Congress Retained Control Over Distribution Of Water By 25 U.S.C. 381

Congress retained control over Indian rights by 25 U.S.C. 381. As correctly observed by the Court of Appeals, 25 U.S.C. 381

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[87] Appendix C to this Petition, p. 33a, note 13, Slip Opinion, August 20, 1980, withdrawn and replaced.

[88] Appendix B to this Petition, p. 22a, note 17, Slip Opinion, June 1, 1981.

[89] *Ibid.* See, the comments by the Court of Appeals respecting the objectives of the General Allotment Act, which are diametrically opposed to the "continued federal control" quoted above.

[90] Vol. 2A, Sutherland, *Statutes and Statutory Construction*, 4th ed., p. 123, §47.23, "Expressio unius est exclusio alterius," citing *Ex Party McCardle*, 74 U.S. 506 (1868); *Stevens* v. *Smith*, 77 U.S. 321 (1870); and numerous other authorities. See, 25 U.S.C. 381, at note 85, *supra*.

". . .suggests continued federal control."[91] Relative to the General Allotment Act, the Court declared that:

> "The extensiveness of this congressional authority, as well as 'Congress' unique obligation toward the Indians,' . . . underlies the judicially fashioned canon of construction that these statutes are to be read to reserve Congress' powers in the absence of a clear expression to the contrary."[92]

Congress was well aware of the meaning of the terms that the Secretary of Interior could make a "just and equal distribution" of a short water supply "among the Indians residing" on a reservation.

The General Allotment Act became law in 1887. In the year 1877 — ten years earlier — in regard to the "public lands," Congress declared that:

> ". . . all surplus water over and above such actual appropriation [by the entryman under the Desert Land Act] . . . together with the water of all lakes, rivers, and other sources of water supply upon the *public lands* and not navigable, shall remain and be held free for the appropriation and use of the public. . . ."[93]

In *California-Oregon Power Company* v. *Portland Beaver Cement Company,* the Court, among other things, declared:

> "As the owner of the public domain, the government possessed the power to dispose of land and water thereon together, or to dispose of them separately."[94]

Continuing, the Court, in *California-Oregon Power Company* v. *Beaver Portland Cement Company,* said this:

> "The fair construction of the provision now under review is that Congress intended to establish the rule that for the future the land should be patented separately; and that all non-navigable waters thereon should be reserved for the use of the public under the laws of the states and territories named."[95]

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[91] Appendix B to this Petition, p. 22a, note 17, Slip Opinion, June 1, 1981.

[92] Northern Cheyenne v. Hollowbreast, 425 U.S. 649, 656 (1975).

[93] 43 U.S.C. 321; March 3, 1877, ch. 107, §1, 19 Stat. 377, as amended. [emphasis supplied]

[94] 295 U.S. 143, 156 (1935).

[95] *Ibid.*, at 156.

The Desert Land Act has no application here.[96] Congress legislated separately in regard to Indian reserved rights to the use of water. It declared that the water would be distributed "among the Indians" on the reservations on a "just and equal" basis. Congress was fully aware of the imperative necessity for water to be available if the Indians were to survive:

> ". . . the [Indian] lands were of the desert kind — hot, scorching sands — and . . . water . . . would be essential to the life of the Indian people. . . ."[97]

Congress intended to retain for the Indians on the reservation — not for the non-Indians — a water supply, which would be distributed on a just and equal basis. That intention to protect the reserved Indian rights is evidenced by the final proviso in 25 U.S.C. 381. Power is vested in the Secretary of Interior to prescribe rules and regulations "to secure a just and equal distribution among the Indians residing" on the Colville Indian Reservation and, to ensure the retention of those rights, Congress added this language to 25 U.S.C. 381:

> ". . . and no other appropriation or grant of water by any riparian proprietor shall be authorized or permitted to the damage of any other riparian proprietor."

Respondents' use of No Name Creek water violates the protection provided for the Colvilles by 25 U.S.C. 381. Irreparable and continuing damage is experienced by the Indians residing in the No Name Creek watershed by the monopolization and utilization of No Name Creek water by the Respondents. The Respondents' activities preclude a just and equal distribution among the Indians. Congress proscribed that violation. Respondents are not permitted, under 25 U.S.C. 381, to "damage" the rights of the "Indians residing" on the reservation, whose reserved rights are to be distributed on a "just and equal" basis.

Congress — Not The Courts — Must Legislate In Regard To The Subject Matter Here Involved

Congress has explicitly declared that, respecting reservations requiring water to make lands available for agriculture, the

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[96] Federal Power Commission v. Oregon, 349 U.S. 435 (1955).

[97] Arizona v. California, 373 U.S. 546, 598 (1963).

Secretary of Interior should prescribe rules and regulations to distribute water "among the Indians residing" on the reservation on a just and equal basis.[98] Non-Indians were excluded. Under those circumstances, it is inappropriate for the Court of Appeals to search for an intent on the part of Congress to void the explicit language of the act in question.

In *Tennessee Valley Authority* v. *Hill,*[99] the Court quoted the crucial provision of the Endangered Species Act. Respecting the Act, it said: "This language admits of no exception."[100] The language of 25 U.S.C. 381, which applies specificially to Indians — excluding non-Indians — likewise ". . . admits of no exception." In rejecting the arguments of the Tennessee Valley Authority, the Court summarized the principles controlling here:

> "It is not for us to *speculate,* much less act, on whether Congress would have altered its stance had the specific events of this case been anticipated.[101]

Pure speculation was indulged in by the Court of Appeals respecting the transferability of Indian reserved rights. In error, it declared:

> "There is nothing to suggest Congress gave any consideration to the transferability of reserved water rights."[102]

Not only did Congress consider transferability, it rejected the concept in 25 U.S.C. 381. Nature of the speculation engaged in by the Court of Appeals is evidenced by the following excerpt from the June 1, 1981 Opinion:

> "To resolve [the issue of transferability that had already been rejected in 25 U.S.C. 381] . . . we must determine what Congress would have intended had it considered it [— the issue of transferability of Indian rights to the use of water to non-Indians]."[103]

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[98] 25 U.S.C. 381.

[99] 437 U.S. 153 (1978).

[100] *Ibid.*, at 173.

[101] *Ibid.*, at 185. [emphasis supplied]

[102] Appendix B to this Petition, p. 15a, para. 7(A), Slip Opinion, June 1, 1981.

[103] *Ibid.*

In rejecting the kind and type of speculation, in which the Court of Appeals engaged respecting the meaning of 25 U.S.C. 381, the Court said this in *Tennessee Valley Authority* v. *Hill*:

> "One might dispute the applicability of these examples to the Tellico Dam by saying that in this case the burden on the public through the loss of millions of unrecoverable dollars would greatly outweigh the loss of the snail darter."[104]

Rejecting as specious that argument, the Court applied the law, rather than attempting by judicial fiat to amend it, declaring:

> ". . . neither the Endangered Species Act nor Art. III of the Constitution provides federal courts with authority to make such fine utilitarian calculations."[105]

In the *TVA* v. *Hill* case, the Court adhered to the premise earlier enunciated in the case of *United States* v. *City and County of San Francisco,* in which it, among other things, declared that:

> "Article 4, §3, Cl. 2 of the Constitution [quoted above] provides that 'The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.' The power over the public land thus entrusted to Congress is without limitations. 'And it is not for the courts to say how that trust shall be administered. That is for Congress to determine.' "[106]

It is not for the Court of Appeals to speculate what Congress might have done had it considered the facts of *Colville* v. *Walton.* As stated in *TVA* v. *Hill,* it is not for the court here to "speculate" as to what Congress *might* have done. It is to proceed upon the basis of what Congress did in fact do.

Executive Authority To Perform Discretionary Acts May Not Be Exercised By The Judiciary

Congress, by 25 U.S.C. 381, gave broad powers to the Secretary of Interior to distribute water on a just and equal basis among Indians residing on the reservation. There has been a failure by the Secretary to exercise those powers. That failure on the part of the Secretary to perform an executive function involv-

[104] 437 U.S. 153, 187 (1978).

[105] *Ibid.*

[106] 310 U.S. 16, 29-30 (1939).

ing a high degree of discretion does not warrant the seizure of the power by the Court of Appeals, as has been attempted. Justice Marshall, in *Marbury* v. *Madison,* was explicit on the subject:

> "The province of the court is, solely, to decide on the rights of individuals, not to inquire how the executive, or executive officers, perform duties in which they have a discretion."[107]

Repeatedly, the Court has adhered to the rationale of *Marbury* v. *Madison,* limiting the authority of the courts and precluding them from seizing executive, discretionary authority, as is here attempted.[108]

Congress Has Not Authorized A Distribution Of Water Among Indians And Non-Indians On The Basis Of Irrigable Acreage

Having decided — it is believed in error — to include non-Indians within the purview of 25 U.S.C. 381, the Court of Appeals proceeded to ignore the mandate that water be distributed among Indians on a just and equal basis. The appellate court declared, without a scintilla of authority, that:

> "If the allottee owns 10% of the irrigable acreage in the watershed, he is entitled to 10% of the water reserved for irrigation (i.e., a 'ratable share')."[109]

It is apparent that the Court of Appeals, *sua sponte,* undertook on its own to make a decision that a just and equal distribution of water among Indians and non-Indians alike should be predicated upon irrigable acreage. There is no evidence in the record as to whether apportionment on an irrigable-acreage basis constitutes a "just and equal" allocation of the short water supply. Most assuredly, it is not for the courts to decide, as a rule of thumb, that under all circumstances, a just and equal distribution of a short water supply should be made on an irrigable-acreage basis.

An Executive officer, making an allocation of a short water supply, necessarily takes into consideration variables. Supplies of that nature frequently fluctuate violently. A just and equal

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[107] 5 U.S. 137, 170 (1803).

[108] Decatur v. Paulding, 39 U.S. 496 (1840).

[109] Appendix B to this Petition, p. 17a, paras. (2)-9, 10, Slip Opinion, June 1, 1981.

distribution can rapidly change on a day-to-day or hour-to-hour basis.

Indeed, it has been found in western states that rotation of water, both as to time and amount, among users, is the proper course to pursue under some circumstances. There is, however, no immutable criterion for what constitutes a just and equal allocation of water at any given time. It is a matter of Executive discretion, not appropriately exercised by the courts.[110]

On the subject, the Court of Appeals for the Ninth Circuit has raised serious questions as to the propriety of a court to undertake managment of water supplies.[111]

Congress Required Secretarial Rules And Regulations As A Condition To Allocating Water "Among the Indians residing" On The Colville Indian Reservation

Congress provided, by 25 U.S.C. 381, that Secretarial rules and regulations could be adopted to secure a just and equal distribution of water among Indians residing on the reservation. Absent those rules and regulations prescribed by Congress, the Indian allottees had no basis upon which to participate in the *Winters* reserved rights, title to which is in the Tribes.

The right to participate in the tribal reserved rights to the use of water can only be triggered by the promulgation and issuance of rules and regulations by the Secretary of Interior, which would permit a just and equal distribution of the water "among the In-

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[110] The process of rotation of an available water supply, both as to times and amounts, has been found to be a method of sound administration involving short supplies of water. See, Krebs v. Perry, 134 Ore. 290, 292 Pac. 319, 293 Pac. 432 (1930); Hufford v. Dye, 162 Cal. 147, 121 Pac. 400 (1912); Anderson v. Bassman, 140 Fed. 14 (C.C. N.D. Cal. 1905); Harris v. Harrison, 93 Cal. 676, 29 Pac. 325 (1892); Wiggins v. Muscupiabe Land & Water Co., 113 Cal. 182, 45 Pac. 160 (1896) — for rotation among riparian users.

[111] See, in that connection, United States v. United States District Court, 206 F.2d 303, 311 (CA 9, 1953). Emphasized there is the fact that the federal district courts should not enter into the "water distributing business." Further emphasized there is that the courts do not have either "advisory or executive powers."

dians residing" on the Colville Indian Reservation.[112] Title to the use of water reserved for the Colville Indian Reservation resides in the Tribes. Under the circumstances, it was plain and serious error for the Court of Appeals to declare that the Colville Indian allottees could transfer their rights to the use of water to the non-Indian predecessors, far removed from the present ownership of the lands by the Respondents.

Congress Was Explicit — 25 U.S.C. 381 Needs No Interpretation — If It Is Interpreted, It Must Be In Favor Of The Indians

Congress provided, in 25 U.S.C. 381, a clear direction that, when water is in short supply on a reservation, it should be distributed "among the Indians residing" on the reservation. In the words of the Court, where the language of a statute ". . . is plain and admits of no more than one meaning the duty of interpretation" does not arise.[113] Certainly, there was no basis for the Court of Appeals to undertake a determination of ". . . what Congress would have intended had it considered. . . ." the issue of transferability.[114] It is manifest that Congress not only considered the issue of transferability to non-Indians — it decided against transfers to non-Indians, reserving the water for the Indians residing on the reservation.

Assuming for discussion only that an interpretation is to be made of the explicit and clear language of 25 U.S.C. 381,

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[112] "Whatever title the Indians have is in the tribe, and not in the individuals, although held by the tribe for the common use and equal benefit of all the members." United States v. Jim, 409 U.S. 80, 82 (1972), quoting Cherokee Nation v. Hitchcock, 187 U.S. 294, 307 (1902).

[113] Caminetti v. United States, 242 U.S. 470, 485 (1916). See abundance of authority on principle quoted, Vol. 2A Sutherland, *Statutes and Statutory Construction*, 4th ed., Text & Commentary, §45.02, pp. 4, *et seq.*

[114] Appendix B to this Petition, p. 15a, para. 7(A), Slip Opinion, June 1, 1981.

guidelines for construing statutes involving Indians have been clearly defined. On the subject, the Court quite recently said this:

> ". . . 'statutes passed for the benefit of dependent Indian tribes . . . are to be liberally construed, doubtful expressions being resolved in favor of the Indians."[115]

CONCLUSION

Resolution of the conflicting claims to rights to the use of water among Indians and non-Indians in western United States is an imperative necessity. Congress prohibited the transfer of Indian rights to non-Indians when, by 25 U.S.C. 381, it retained the rights to the use of water for an equal distribution "among the Indians residing" on the reservations. In so doing, Congress fulfilled its obligation as trustee for the Tribes. A different course of conduct by Congress would have been catastrophic to the Indians. At issue here is their survival. Accordingly, the Colville Confederated Tribes respectfully request the Court to grant their Petition for a Writ of Certiorari.

August 1981

Respectfully submitted,

William H. Veeder
Suite 920
818 18th Street, N.W.,
Washington, D.C., 20006
[202] 466-3890

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[115] Bryan v. Itasca County, 426 U.S. 373, 392 (1976), quoting Alaska Pacific Fisheries v. United States, 248 U.S. 78, 79 (1918).

No. 81-_____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

COLVILLE CONFEDERATED TRIBES, *Petitioners,*

v.

BOYD WALTON, JR., *et ux, et al.*, and THE STATE OF WASHINGTON, *Intervenor, Respondents.*

UNITED STATES OF AMERICA, *Respondents,*

v.

WILLIAM BOYD WALTON, *et ux,* and THE STATE OF WASHINGTON, *Respondents.*

UNITED STATES OF AMERICA, *Respondents,*

v.

WILLIAM BOYD WALTON, *et ux,* and THE STATE OF WASHINGTON, *Respondents.*

COLVILLE CONFEDERATED TRIBES, *Petitioners,*

v.

BOYD WALTON, JR., *et ux, et al.*, and THE STATE OF WASHINGTON, *Respondents.*

UNITED STATES OF AMERICA, *Respondents,*

v.

WILLIAM BOYD WALTON, *et ux, et al.*, and THE STATE OF WASHINGTON, *Respondents.*

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

WILLIAM H. VEEDER, *Attorney*
COLVILLE CONFEDERATED TRIBES

Suite 920
818 18th Street, N.W.
Washington, D.C. 20006
(202) 466-3890

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 79-4297
No. 79-4309
No. 79-4383
DC CV 3421
3831 MAN

COLVILLE CONFEDERATED TRIBES, *Plaintiff-Appellant,*

vs.

BOYD WALTON, JR., *et ux., et al., Defendants-Appellees,*

and

STATE OF WASHINGTON, *Intervening Defendant-Appellee,*

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

vs.

WILLIAM BOYD WALTON, *et ux., Defendants-Appellants,*

and

STATE OF WASHINGTON, *Defendant-Appellant.*

Filed July 13 1981

APPEAL from the United States District Court for the EASTERN District of WASHINGTON (Spokane)

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the EASTERN District of WASHINGTON (Spokane) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the _____ judgment of the said District Court in this Cause be, and hereby is reversed in part, affirmed in part, and remanded.

/s/ OSCAR (ILLEGIBLE)
Oscar (illegible)
Deputy Clerk

Filed and entered June 1, 1981

APPENDIX B

UNITED STATES COURT OF APPEALS,
NINTH CIRCUIT

Nos. 79-4297, 79-4309 and 79-4383.

COLVILLE CONFEDERATED TRIBES, *Plaintiff-Appellant,*

v.

BOYD WALTON, JR., *et ux., et al., Defendants-Appellees,*

and

STATE OF WASHINGTON, *Intervening Defendant-Appellee.*

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

v.

WILLIAM BOYD WALTON *et ux., Defendants-Appellants,*

and

STATE OF WASHINGTON, *Defendant.*

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

v.

WILLIAM BOYD WALTON, JR., *et ux., Defendants,*

and

STATE OF WASHINGTON, *Defendant-Appellant.*

Argued and Submitted June 6, 1980.
Decided June 1, 1981.

Appeal from the United States District Court for the Eastern District of Washington.

Before WRIGHT and SKOPIL, Circuit Judges, and CURTIS,* Senior District Judge.

WRIGHT, Circuit Judge:

Rehearing has been granted. The opinion filed on August 20, 1980 is withdrawn and is replaced by this opinion.

The Colville Confederated Tribes initiated this case a decade ago. They sought to enjoin Walton, non-Indian owner of allotted lands, from using surface and ground waters in the No Name Creek basin. The State of Washington intervened, asserting its authority to grant water permits on reservation lands, and the case was consolidated with a separate suit brought by the United States against Walton.

I. Background

A.

In 1871 the predecessors of the Colville Confederate Tribes had no treaty with the United States and no reservation.[1] These Indians were contemporaneously described as "good farmers, [who] raise extensive crops, make good improvements, and own stocks of cattle and horses." [1871] *Report of the Commissioner of Indian Affairs*, 277.

After the Civil War, settlers had begun to encroach on Indian lands. The Farmer in charge at Fort Colville reported that violence was likely unless a reservation was established to protect Indian interests. *Id.* In response to a request from the Commissioner of Indian Affairs, President Grant created the Colville Reservation. Executive Order of July 2, 1872,

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* The Honorable Jesse W. Curtis, Senior District Judge for the Central District of California, sitting by designation.

[1] The Colville Confederated Tribes included the Methow, Okanogon, Sampoil, Nespelem, Lake, and Colville Tribes. *See Confederated Tribes of the Colville Reservation* v. *United States*, 4 Ind.Cl.Comm. 151 (1956); I. Kappler, *Indian Affairs and Treaties*, 915 (2d ed. 1904). In this opinion, they will be referred to as the Tribe or the Colvilles.

reprinted in 1 Kapler, *Indian Affairs, Laws and Treaties*, 915-16. (2d ed. 1904).[2] Twenty years later, the northern half of the reservation was taken from the Indians and opened for entry and settlement.[3]

In 1906, Congress ratified an agreement with the Colvilles that provided for distribution of reservation lands to the Indians pursuant to the General Allotment Act of 1887, 24 Stat. 388, and for disposition of the remainder by entry and settlement. Act of Mar. 22, 1906, Pub.L. No. 59-61, ch. 1126, 34 Stat. 80. The agreement was effectuated by Presidential proclamation in 1916.[4] 39 Stat. 1778.

In 1917, a row of seven allotments was created in the No Name Creek watershed. Walton, a non-Indian, now owns the middle three, numbers 525, 2371 and 894. He bought them in 1948 from an Indian, not a member of the Tribe, who had begun to irrigate the land by diverting water for 32 acres from No Name Creek. Walton immediately procured a permit from the state to irrigate 65 acres by diverting up to 1 cubic foot per second "subject to existing rights." He now irrigates 104 acres and uses additional water for domestic and stock water purposes.

The United States holds the remaining allotments in trust for the Colville Indians. Allotments 526 and 892 are north of

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[2] Indians who did not live on the land reserved for them were compelled to leave valuable tracts on which they had made extensive improvements and move to the reservation. [1872] *Report of the Commissioner of Indian Affairs*, 62.

[3] Approximately 1.5 million acres were returned to the public domain. Act of July 1, 1892, 27 Stat. 62.

[4] The reservation remained open for settlement until 1934, when the Secretary of the Interior "temporarily" withdrew the surplus lands pursuant to the Reorganization Act. Congress permanently restored those lands to the beneficial use of the Tribe in 1956. Act of July 24, 1956, Pub.L. No. 84-772, ch. 684, 70 Stat. 626. In passing that Act, Congress acknowledged that the Indians' consent to opening the reservation for settlement was of questionable validity. *See*. H.R.Rep. No. 2080, 84th Cong., 2d Sess. 2 (1956).

Walton's property and allotments 901 and 903 are south. Allotments 892, 901 and 903 are held for heirs of the original allottees, but the Tribe has a long-term lease. Allotment 526 is beneficially owned by the Tribe.[5]

B.

The No Name Creek is a spring-fed creek flowing south into Omak Lake, which has no outlet and is saline. The No Name hydrological system, consisting of an underground aquifer and the creek, is located entirely on the Colville Reservation.

The aquifer lies under the Indians' northern allotments and the northern tip of Walton's allotment, number 525. No Name Creek originates on the southern tip of the Indians' allotment number 802 and flows through Walton's allotments and the Indians' southern allotments.

C.

Salmon and trout were traditional foods for the Colville Indians, but the salmon runs have been destroyed by dams on the Columbia River. In 1968, the Tribe, with the help of the Department of the Interior, introduced Lahonton cutthroat trout into Omak Lake. The species thrives in the lake's saline water, but needs fresh water to spawn. The Indians cultivated No Name Creek's lower reach to establish spawning grounds but irrigation use depleted the water flow during spawning season. The federal government has given the Indians fingerlings to maintain the stock of trout.

II. The Case Below

The trial court found that 1,000 acre feet per year of water were available in No Name Creek Basin in an average year. It calculated the quantity of the Colvilles' reserved water rights on the basis of irrigable acreage. The court excluded the

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[5] We assume that none of the Colvilles' allotments ever passed from Indian ownership.

northern-most allotment, number 526, because the evidence showed that it was formerly irrigated with the surface waters of Omak Creek, and the Tribe had not demonstrated that water to irrigate it was required from the No Name system.

The trial court determined the Indians had a reserved right to 666.4 acre feet per year of water from the No Name Creek Basin. It held that Walton was not entitled to share in the Colvilles' reserved water rights. The trial court found, however, that the Colvilles were irrigating only a portion of the irrigable acres included in its calculation.

Under the district court's findings, in an average year there are 333.6 acre feet per year of water not subject to the Indians' reserved right. There are an additional 237.6 acre feet per year of water to which the Indians have a reserved right, but which they are not currently using. This water is available for appropriation by non-Indians, subject to the Indians' superior right. The court held that Walton had a right to irrigate the 32 acres under irrigation at the time he acquired his land, with a priority date of the actual appropriation of water for that use.

The court also held that the Indians were potentially entitled to use water to propagate trout, but refused to award water for that purpose. It concluded that spawning was unnecessary because fingerlings were provided free by the federal government.

By post-trial motion, the Indians sought permission to use some of their irrigation water for trout spawning. The motion was granted and the Tribe has since pumped aquifer water from their wells into No Name Creek during spawning season.

Finally, the court decided that the state could regulate No Name water not reserved for Indian use.

Walton, the Tribe and the State appeal parts of the decision. *Colville Confederated Tribes* v. *Walton*, 460 F.Supp. 1320 (E.D.Wash.1978).[6]

III. The Tribe's Water Rights

The Colvilles argue they have a right to use the waters of the No Name system under the implied-reservation, or *Winters* doctrine. We first consider the existence and the extent of that right.

A.

[1, 2] Congress has the power to reserve unappropriated water for use on appurtenant lands withdrawn from the public domain for specific federal purposes. *United States* v. *New Mexico*, 438 U.S. 696, 698, 98 S.Ct. 3012, 3013, 57 L.Ed.2d 1052 (1978). Where water is needed to accomplish those purposes, a reservation of appurtenant water is implied. *Id.* at 700, 98 S.Ct. at 3014; *Cappaert* v. *United States*, 426 U.S. 128, 139, 96 S.Ct. 2062, 2069, 48 L.Ed.2d 523 (1976). The United States acquires a water right vesting on the date the reservation was created, and superior to the rights of subsequent appropriators. *Cappaert*, 436 U.S. at 138, 96 S.Ct. at 2069.

[3] An implied reservation of water for an Indian reservation will be found where it is necessary to fulfill the purposes of the reservation. In *United States* v. *Winters*, 207 U.S. 564, 576, 28 S.Ct. 207, 211, 52 L.Ed. 340 (1908), the Court found an implied reservation because the land of the Fort Belknap

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[6] The Tribe asked the United States to intervene on its behalf. Instead, the Justice Department filed a separate suit against Walton, based on the theory that the Secretary of the Interior has exclusive jurisdiction over all the water on the reservation. The trial court consolidated the proceedings *sua sponte*. The United States filed an appeal from the decision and the Tribe moved "not to be bound" by any ruling on *U. S.* v. *Walton*, No. 79-4619. The United States has since dropped its appeal and we deny the Tribe's motion.

reservation would have been valueless without water. Similarly, an implied reservation was found where water was "essential to the life of the Indian people." *Arizona* v. *California*, 373 U.S. 546, 599, 83 S.Ct. 1468, 1497, 10 L.Ed.2d 542 (1963).

[4] In those cases, if water had not been reserved, it would have been subject to appropriation by non-Indians under state law. Because the Indians were not in a position, either economically or in terms of their development of farming skills, to compete with non-Indians for water rights, it was reasonable to conclude that Congress intended to reserve water for them.[7]

The Colvilles were in a similar position when their reservation was created. As in *Winters*, the Indians relinquished extensive land and water holdings when the reservation was created. Some gave up valuable tracts with extensive improvements. Note 2, *supra*.

Congress intended to deal fairly with the Indians by reserving waters without which their lands would be useless. *Arizona* v. *California*, 373 U.S. at 600, 83 S.Ct. at 1497. We hold that water was reserved when the Colville Reservation was created.

B.

[5] The more difficult question concerns the amount of water reserved. In determining the extent of an implied reservation of water for a national forest, the Supreme Court held:

> Where water is necessary to fulfill the very purposes for which a federal reservation was created, it is reasonable to conclude, even in the face of Congress' express deference to state water law in other areas, that the United States intended to reserve the necessary water. Where water is only valuable for a secondary use of the

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[7] The *Winters* doctrine applies to reservations created by treaty or executive order. *Arizona* v. *California*, 373 U.S. 546, 598, 83 S.Ct. 1468, 1496, 10 L.Ed.2d 542 (1963).

> reservation, however, there arises the contrary inference that Congress intended, consistent with its other views, that the United States would acquire water in the same manner as any other public or private appropriator.

United States v. *New Mexico*, 438 U.S. at 702, 98 S.Ct. at 3015.

[6] We apply the *New Mexico* test here. The specific purposes of an Indian reservation, however, were often unarticulated.[8] The general purpose, to provide a home for the Indians, is a broad one and must be liberally construed.[9] We are mindful that the reservation was created for the Indians, not for the benefit of the government.

To identify the purposes for which the Colville Reservation was created, we consider the document and circumstances surrounding its creation, and the history of the Indians for whom it was created. We also consider their need to maintain

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[8] For example, the order creating the Colville reservation read:

> It is hereby ordered that . . . the country bounded on the east and south by the Columbia River, on the west by the Okanogan River, and on the north by the British possessions, be, and the same is hereby, set apart as a reservation for said Indians, and for such other Indians as the Department of the Interior may see fit to locate thereon.

Executive Order of July 2, 1872, *reprinted in* 1 Kappler, *Indian Affairs and Treaties*, 916 (2d ed. 1904). Reservations were commonly created with similar language. *See* U.S. Dept. of the Interior, *Federal Indian Law*, 613-22 (1958). The President's orders responded to requests from officers in the Department of the Interior but it is difficult to identify or to know how much weight to give to their purpose.

[9] *See United States* v. *Winans*, 198 U.S. 371, 381, 25 S.Ct. 662, 664, 49 L.Ed. 1089 (1905). The rule of liberal construction should apply to reservations created by Executive Order. *See Arizona* v. *California*, 373 U.S. 546, 598, 83 S.Ct. 1468, 1496, 10 L.Ed.2d 542 (1963). Congress envisioned agricultural pursuits as only a first step in the "civilizing" process. *See, e.g.*, 11 Cong.Rec. 905 (1881). This vision of progress implies a flexibility of purpose.

themselves under changed circumstances.[10] *See United States* v. *Winans*, 198 U.S. 371, 381, 25 S.Ct. 662, 664, 49 L.Ed. 1089 (1905).

These factors demonstrate that one purpose for creating this reservation was to provide a homeland for the Indians to maintain their agrarian society. In a similar setting, the Supreme Court agreed with a Master's finding that water was reserved to meet future as well as present needs, and concluded "that the only feasible and fair way by which reserved water for the reservation can be measured is irrigable acreage." *Arizona* v. *California*, 373 U.S. at 600-01, 83 S.Ct. at 1497-98. We conclude that, when the Colville reservation was created, sufficient appurtenant water was reserved to permit irrigation of all practicably irrigable acreage on the reservation.

Providing for a land-based agrarian society, however, was not the only purpose for creating the reservation. The Colvilles traditionally fished for both salmon and trout. Like other Pacific Northwest Indians, fishing was of economic and religious importance to them. *See Washington* v. *Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. 658, 665, 99 S.Ct. 3055, 3064, 61 L.Ed.2d 823 (1978); *United States* v. *Winans, supra*; [187'' Report of the Commissioner of Indian Affairs 277.

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[10] *See Alaska Pacific Fisheries* v. *United States*, 248 U.S. 78, 39 S.Ct. 40, 63 L.Ed. 138 (1918) (exclusive right to fish implied because necessary for self-sustaining community); *United States* v. *Shoshone Tribe*, 304 U.S. 111, 58 S.Ct. 794, 82 L.Ed. 1213 (1938) (reservation for "absolute and undisturbed use and occupation" includes ownership of minerals and standing timber); *Menominee Tribe of Indians* v. *United States*, 391 U.S. 404, 406, 88 S.Ct. 1705, 1707, 20 L.Ed.2d 697 (1968) (reservation "for a home" includes hunting and fishing rights); and *United States* v. *Finch*, 548 F.2d 822, 832 (9th Cir. 1976) (U.S. intended to reserve right of Indians to sustain themselves "from any source of food which might be available.")

The Tribe's principal historic fishing grounds on the Columbia River have been destroyed by dams. The Indians have established replacement fishing grounds in Omak Lake by planting a non-indigenous trout.

We agree with the district court that preservation of the tribe's access to fishing grounds was one purpose for the creation of the Colville Reservation. Under the circumstances, we find an implied reservation of water from No Name Creek for the development and maintenance of replacement fishing grounds.

We note that the nature of a right to water for a replacement fishery is such that it cannot coexist with continuing rights to water for a fishery in the water-shed where the fishery historically existed. Walton does not argue that the tribe has such rights. We affirm the district court's holding that the Colvilles have a reserved right to the quantity of water necessary to maintain the Omak Lake Fishery.

C.

[7] The district court held that water for spawning could not be awarded at this time because the federal government provides the necessary fingerlings. We reverse this holding.

The right to water to establish and maintain the Omak Lake Fishery includes the right to sufficient water to permit natural spawning of the trout. When the Tribe has a vested property right in reserved water, it may use it in any lawful manner. As a result, subsequent acts making the historically intended use of the water unnecessary do not divest the Tribe of the right to the water.

We recognize that open-ended water rights are a growing source of conflict and uncertainty in the West. Until their extent is determined, state-created water rights cannot be relied on by property owners. *See* Laird, *The Winters Cloud Over the Rockies: Water Rights and the Development of Western Energy Resources*, 7 Am. Indian L.Rev. 15 (1979); Public Land Law Review Commission, *One Third of the Nations Lands*, 144 (1970).

Resolution of the problem is found in quantifying reserved water rights, not in limiting their use. The Special Master in *Arizona* v. *California* determined that the purposes for which the reservation was created governed the quantification of reserved water, but not the use of such water:

> This [method of quantifying water rights] does not necessarily mean, however, that water reserved for Indian Reservations may not be used for purposes other than agricultural and related uses . . . . The measurement used in defining the magnitude of the water rights is the amount of water necessary for agriculture and related purposes because this was the initial purpose of the reservation, but *the decree establishes a property right which the United States may utilize or dispose of for the benefit of the Indians as the relevant law may allow.*

Report from Simon H. Rifkind, Special master, to the Supreme Court 265-66 (December 5, 1960) (emphasis added).

The Department of the Interior has taken the position that a change of use is permissible. *See* Memorandum from Solicitor of the Department of the Interior to the Secretary of the Interior, February 1, 1964 (use of reserved water for recreation and housing development).

Finally, we note that permitting the Indians to determine how to use reserved water is consistent with the general purpose for the creation of an Indian reservation — providing a homeland for the survival and growth of the Indians and their way of life.

D.

We agree with the district court that water for Allotment 526 need not be included in its calculations, since such water is potentially available from Omak Creek.[11] The Indians have not demonstrated that water is unavailable from Omak Creek, or that its use involves significant disadvantages.[12]

[11] Omak Creek and No Name Creek have no surface connection.

[12] The Indians may be deprived of the use of wells drilled on allotment 526 but those were constructed with the understanding that this litigation would be unaffected.

IV. The General Allotment Act of 1887

We next consider Walton's rights as the fee owner of allotted land, and reverse the district court's judgment that he has no right to reserved water.

A.

The General Allotment Act provided that land on reservations could be allotted for the exclusive use of individual Indians. Remaining land was to be made available for homesteading by non-Indians. After holding allotted lands in trust for individual Indians for a 25-year period, the federal government could convey the land to the allottee in fee, "discharged of said trust and free of all charge or incumbrance whatsoever." 25 U.S.C. §348.

Because the use of reserved water is not limited to fulfilling the original purposes of the reservation, Congress had the power to allot reserved water rights to individual Indians, and to allow for the transfer of such rights to non-Indians. Whether it did so is a question of congressional intent.

The General Allotment Act represented the shift in federal objectives from segregation of Indians on reservations to assimilation of them in non-Indian culture and society. Its primary sponsor, Senator Dawes, explained that "the quicker [the Indian] is mingled with the whites in every particular the better it will be." Report of the Secretary of the Interior, *Proceedings of Mohonk Lake Conference*, H.R. Exec. Doc. No. 75, 49th Cong., 2d Sess. 992 (1887).

The Act was designed to encourage Indians to become self-supporting citizens by making them landowners. *See generally* D. Otis, *The Dawes Act and the Allotment of Indian Lands* 8-32 (1973). Allotted lands were held in trust for a 25-year period because of

> the desire to protect the Indian against sharp practices leading to Indian landlessness, the desire to safeguard the certainty of titles, and the urge to continue an important basis of governmental activity [on the Indians' behalf].

F. Cohen, *Handbook of Federal Indian Law* 221 (1940); U.S. Department of Interior, *Federal Indian Law* 788-89 (1958).

The only reference to water rights in the Act is found in section 7:

> In cases where the use of water for irrigation is necessary to render the lands within any Indian reservation available for agricultural purposes, the Secretary of the Interior is authorized to prescribe such rules and regulations as he may deem necessary to secure a just and equal distribution thereof among the Indians residing upon any such reservation; and no other appropriation or grant of water by an riparian proprietor shall be authorized or permitted to the damage of any other riparian proprietor.

25 U.S.C. §381.

The Act was passed over 20 years before the Supreme Court announced the implied-reservation doctrine in *Winters*. There is nothing to suggest Congress gave any consideration to the transferability of reserved water rights. To resolve this issue, we must determine what Congress would have intended had it considered it.

B.

[8] It is settled that Indian allottees have a right to use reserved water. *United States* v. *Powers*, 305 U.S. 527, 59 S.Ct. 344, 83 L.Ed. 330 (1939).[11] "[W]hen allotments were

[11] In *Powers*, the federal government had constructed an irrigation project on the Crow Reservation capable of irrigating 20,000 acres. Due to a drought and upstream diversions by respondents (non-Indian successors to Indian allottees), 8,000 acres within the project could not be irrigated.

The government sought an injunction against respondents' diversions. The irrigation project had been completed prior to allotment of respondents' lands. The government argued that the project served to "dedicate and reserve" water for irrigation of the 20,000 acres, and that the rights subsequently acquired by Indian allottees were subject to that reservation.

The Court stated the respondents "succeeded to the interest of the original allottees either by mesne conveyances or by purchase at

made for exclusive use and thereafter conveyed in fee, the right to use some portion of tribal waters essential for cultivation passed to the owners." *Id.* at 532, 59 S.Ct. at 346. We must determine whether non-Indian purchasers of allotted lands also obtain a right to some portion of reserved waters.

(1)

[9, 10] The general rule is that termination or diminution of Indian rights requires express legislation or a clear inference of Congressional intent gleaned from the surrounding circumstances and legislative history. *See Bryan* v. *Itasca County*, 426 U.S. 373, 392-93, 96 S.Ct. 2102, 2112-13, 48 L.Ed.2d 710 (1975); *Mattz* v. *Arnett*, 412 U.S. 481, 504-05, 93 S.Ct. 2245, 2257-58, 37 L.Ed.2d 92 (1972). Upon careful consideration, we conclude this principle supports the proposition that an Indian allottee may sell his right to reserved water.

The district court's holding that an Indian allottee may convey only a right to the water he or she has actually appropriated with a priority date of actual appropriation reduces the value of the allottee's right to reserved water. We think this type of restriction on transferability is a "diminution of Indian rights" that must be supported by a clear inference of Congressional intent.

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government sales of deceased allottees' lands." 305 U.S. at 531, 59 S.Ct. at 346. It then recited the government's argument and refuted it, relying in part on section 7 of the Allotment Act, by demonstrating that Indian allottees acquired a right to share in reserved water.

The Court held the government had shown no basis for the injunction, but did not consider "the extent or precise nature of respondents' rights in the waters." 305 U.S. at 533, 59 S.Ct. at 346.

If an Indian allottee's right to reserved water does not pass to his or her successor, there would have been a basis for the injunction. Walton therefore argues that *Powers* holds an allottee's right to reserved water is acquired by his non-Indian successor. The government, however, did not present that issue. The Court rejected the only argument made by the government, *i. e.*, that Indian allottees did not acquire rights to reserved water.

By placing allotted lands in trust for 25 years, Congress evinced an intent to protect Indians by preventing transfer of those lands.[14] But there is no basis for an inference that some restrictions survived beyond the trust period. Congress provided for extensions of the trust period, but directed that fee title be conveyed to the allottee when the period expired. We think the fee included the appurtenant right to share in reserved waters, and see no basis for limiting the transferability of that right.

This conclusion is supported by our decision in *United States* v. *Ahtanum Irrigation District*, 236 F.2d 321, 342 (9th Cir. 1956), *cert. denied*, 352 U.S. 988, 77 S.Ct. 386, 1 L.Ed.2d 367 (1957). *Ahtanum* held that non-Indian purchasers of allotted lands are entitled to "participate ratably" with Indian allottees in the use of reserved water. *See United States* v. *Adair*, 478 F.Supp. 336 (D.Ore.1979); *United States* v. *Hibner*, 27 F.2d 909 (D.Idaho 1928).

(2)

In determining the nature of the right acquired by non-Indian purchasers, we consider three aspects of an allottee's right to use reserved waters.

First, the extent of an Indian allottee's right is based on the number of irrigable acres he owns. If the allottee owns 10% of the irrigable acreage in the watershed, he is entitled to 10% of the water reserved for irrigation (i. e., a "ratable share"). This follows from the provision for an equal and just distribution of water needed for irrigation.

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[14] The subsequent history of the General Allotment Act demonstrates that this protection was extraordinarily inadequate. By the 1930's approximately 90 million acres out of 140 million acres owned by Indian tribes in 1887 had passed into non-Indian ownership. American Indian Policy Review Commission, Final Report 66-70 (1977). This history, however, has no bearing on congressional intent with regard to water rights in 1887; if anything, it demonstrates Congress intended less protection for Indian rights than the rhetoric of the Act's sponsor would suggest.

A non-Indian purchaser cannot acquire more extensive rights to reserved water than were held by the Indian seller. Thus, the purchaser's right is similarly limited by the number of irrigable acres he owns.

Second, the Indian allottee's right has a priority as of the date the reservation was created. This is the principal aspect of the right that renders it more valuable than the rights of competing water users, and therefore applies to the right acquired by a non-Indian purchaser. In the event there is insufficient water to satisfy all valid claims to reserved water, the amount available to each claimant should be reduced proportionately.

Third, the Indian allottee does not lose by non-use the right to a share of reserved water. This characteristic is not applicable to the right acquired by a non-Indian purchaser. The non-Indian successor acquires a right to water being appropriated by the Indian allottee at the time title passes. The non-Indian also acquires a right, with a date-of-reservation priority date, to water that he or she appropriates with reasonable diligence after the passage of title. If the full measure of the Indian's reserved water right is not acquired by this means and maintained by continued use, it is lost to the non-Indian successor.

The full quantity of water available to the Indian allottee thus may be conveyed to the non-Indian purchaser. There is no diminution in the right the Indian may convey. We think Congress would have intended, however, that the non-Indian purchaser, under no competitive disability vis-a-vis other water users, may not retain the right to that quantity of water despite non-use. *See United States* v. *Adair* 478 F.Supp. at 348-49; *United States* v. *Hibner*, 27 F.2d at 912.

C.

The district court's holding that Walton has no right to share in water reserved when the Colville reservation was created is reversed. On remand, it will need to determine the number of irrigable acres Walton owns, and the amount of

water he appropriated with reasonable diligence in order to determine the extent of his right to share in reserved water.

V. State Permits

Finally, we consider Walton's claim to water rights based on state water permits. We hold that the state has no power to regulate water in the No Name system, and the permits are of no force and effect.

A.

[11] State regulatory authority over a tribal reservation may be barred either because it is pre-empted by federal law, or because it unlawfully infringes on the right of reservation Indians to self-government. *White Mountain Apache Tribe* v. *Bracker*, _____ U.S. _____, 100 S.Ct. 2578, 2583, 65 L.Ed.2d 665 (1980); *White Mountain Apache Tribe* v. *Arizona*, Nos. 78-3427, 79-4294, Slip op. p. 1190, _____ F.2d _____ (9th Cir., April 6, 1981). Although these barriers are independent, they are related by the concept of tribal sovereignty. "The tradition of Indian sovereignty over the reservation and tribal members must inform the determination whether the exercise of state authority has been pre-empted by operation of federal law." *Bracker*, 100 S.Ct. at 2573.

Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory. *Id.; United States* v. *Mazurie*, 419 U.S. 544, 557, 95 S.Ct. 710, 717, 42 L.Ed.2d 706 (1975).

> The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance. But until Congress acts, the tribes retain their existing sovereign powers. In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status.

United States v. *Wheeler*, 435 U.S. 313, 323, 98 S.Ct. 1079, 1086, 55 L.Ed.2d 303 (1978) (citations omitted).

[12] A tribe's inherent power to regulate generally the conduct of non-members on land no longer owned by, or held in trust for the tribe was impliedly withdrawn as a necessary result of its dependent status. *Montana* v. *United States*, _____ U.S. _____, 101 S.Ct. 1245, 1257, 67 L.Ed.2d 493 (1981). Exceptions to this implied withdrawal exist. A tribe retains the inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the health and welfare of the tribe. *Id.* This includes conduct that involves the tribe's water rights. *See id.* at n.15.

A water system is a unitary resource. The actions of one user have an immediate and direct effect on other users. The Colvilles' complaint in the district court alleged that the Waltons' appropriations from No Name Creek imperiled the agricultural use of downstream tribal lands and the trout fishery, among other things. *Cf. Montana*, _____ U.S. at _____, 101 S.Ct. at 1259 (complaint did not allege peril to subsistence or welfare of tribe from non-Indian hunting and fishing on fee lands).

Regulation of water on a reservation is critical to the lifestyle of its residents and the development of its resources. Especially in arid and semi-arid regions of the West, water is the lifeblood of the community. Its regulation is an important sovereign power.

Although we need not decide whether this power resides exclusively in the tribe or the federal government, or whether it may be exercised by them jointly, its importance forms the backdrop for our consideration of the pre-emption issue.

B.

[13] We hold that state regulation of water in the No Name system was pre-empted by the creation of the Colville Reservation. The geographic facts of this case make resolution of this issue somewhat easier than it otherise might be. The No-Name water system is non-navigable and is entirely within the boundaries of the reservation. Although some of the water

passes through lands now in non-Indian ownership, all of those lands are also entirely within the reservation boundaries.

The Supreme Court has held that water use on a federal reservation is not subject to state regulation absent explicit federal recognition of state authority. *Federal Power Commission* v. *Oregon*, 349 U.S. 435, 75 S.Ct. 832, 99 L.Ed. 1215 (1955).[15] Thus, in creating the Colville Reservation, the federal government pre-empted state control of the No Name system.[16]

In *United States* v. *McIntire*, 101 F.2d 650, 654 (9th Cir. 1934), we held that state water laws are not controlling on an Indian reservation:

> [T]he Montana statutes regarding water rights are not applicable, because Congress at no time has made such

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[15] The FPC had licensed construction of a dam on federal property. The lands that would have been flooded were held by the federal government. They had been reserved either as an Indian reservation or for power generation. The flow of the river would have been undiminished below the dam.

This court held the licensee had to obtain state approval because of the state's control over non-navigable waters on the public domain. 211 F.2d 347 (9th Cir. 1954).

The Supreme Court reversed. It held that congressional acts giving the states control of water on the public domain were inapplicable on a federal reservation.

"It is a familiar principle of public land law that statutes providing generally for disposal of the public domain are inapplicable to lands which are not unqualifiedly subject to sale and disposition because they have been appropriated for some other purpose . . . [I]t is enough for the instant case, to recognize that these Acts do not apply to this license, which relates only to the use of waters on reservations of the United States."

349 U.S. at 448, 75 S.Ct. at 840 (citations omitted).

[16] We need not consider what effect the opening of reservation lands for entry and settlement had on the control of water on or appurtenant to such lands. All of the lands here involved were allotted.

> statutes controlling in the reservation. In fact, the Montana enabling act specifically provided that Indian lands within the limits of the state, 'shall remain under the absolute jurisdiction and control of the Congress of the United States.'

Identical language appears in the Washington Enabling Act, Ch. 180, 25 Stat. 676, 677 (1889).[17]

We adhere to this holding because we find no indication Congress intended the state to have this power. In a series of Acts culminating in the Desert Lands Act of 1877, ch. 107, 19 Stat. 377, Congress gave the states plenary control of water on the public domain. *California Oregon Power Co.* v. *Beaver Portland Cement Co.*, 295 U.S. 142, 163-64, 55 S.Ct. 725, 731, 79 L.Ed.2d 1356 (1935). Based on this and other legislation, the Supreme Court concluded that Congress almost invariably defers to state water law when it expressly considers water rights. *United States* v. *New Mexico*, 438 U.S. 696, 702, 98 S.Ct. 3012, 3015, 57 L.Ed.2d 1052 (1978).

This deference is not applicable to water use on a federal reservation, at least where such use has no impact off the reservation. *FPC* v. *Oregon*, 349 U.S. at 448, 75 S.Ct. at 840. The usual policy stems in part from the need to permit western states to fashion water rights regimes that are responsive to local needs, and in part from the "legal confusion that would arise if federal water law and state water law reigned side by side in the same locality." *California* v. *United States*, 438 U.S. 645, 653-54, 668-69, 98 S.Ct. 2985, 2989-90, 2997-98, 57 L.Ed.2d 1018 (1978).

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[17] The state argues that *McIntire* is distinguishable for two reasons. First, it argues the court had already held the waters were reserved. It is clear, however, that the court did not rely on this in holding state water law inapplicable on the reservation.

Second, Washington argues the purchase of allotted lands by a non-Indian "severed . . . any special federal trust status." The lands are still part of the reservation, however. The only mention of water rights in the Allotment Act suggests continued federal control. 25 U.S.C. §381.

Neither rationale is applicable here. Where land is set aside for an Indian reservation, Congress has reserved it for federal, as opposed to state needs. Because the No Name system is located entirely within the reservation, state regulation of some portion of its waters would create the jurisdictional confusion Congress has sought to avoid.

Public Law 280, Act of August 15, 1953, 67 Stat. 588, did not delegate this regulatory power to the state. Nor do we perceive the McCarran Amendment, 43 U.S.C. §666, as expanding the state's regulatory powers over water on a federal reservation.

Finally, we note that the state's interest in extending its water law to the reservation is limited in this case. Tribal or federal control of No Name waters will have no impact on state water rights off the reservation.

Thus, we conclude that Walton's state permits are of no force and effect.

VI. Conclusion

On remand, the district court will calculate the respective rights of the parties. To the extent Walton's use of water exceeds his rights and interferes with the rights of the tribe, it will be enjoined.

REVERSED IN PART, AFFIRMED IN PART, AND REMANDED for proceedings in conformance with this opinion. The parties will bear their own costs on this appeal.[18]

[18] We are persuaded of the correctness of our analysis and conclusion concerning the transferability of the water rights involved in this litigation. Nevertheless, we recognize that reasonable minds hold conflicting views. State and federal courts, state and federal agencies responsible in water rights administration, and the numerous Indian tribes, allottees and their transferees, are plagued almost on a daily basis with the problems and uncertainties surrounding the issues discussed in this opinion. This case presents an appropriate vehicle for the Supreme Court to give guidance and stability to an area of great unrest and uncertainty in Western water and land law. A definitive resolution is overdue. The magnitude of the problem cannot be overstated.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 79-4297

COLVILLE CONFEDERATED TRIBES, *Plaintiff/Appellant,*

vs.

BOYD WALTON, JR., *et ux, et al., Defendants/Appellees,*

and

STATE OF WASHINGTON, *Intervening Defendant/Appellee*

No. 79-4309

UNITED STATES OF AMERICA, *Plaintiff/Appellee,*

vs.

WILLIAM BOYD WALTON, *et ux, Defendants/Appellants,*

and

STATE OF WASHINGTON, *Defendant.*

No. 79-4383

UNITED STATES OF AMERICA, *Plaintiff/Appellee,*

vs.

WILLIAM BOYD WALTON, JR., *et ux, Defendants,*

and

STATE OF WASHINGTON, *Defendant/Appellant.*

Appeal from the United States District Court
for the Eastern District of Washington

[Argued and Submitted June 6, 1980]

OPINION

Filed August 20, 1980

Before: WRIGHT and SKOPIL, Circuit Judges, and CURTIS, Senior District Judge.*

WRIGHT, Circuit Judge:

Walton and the Colville Confederated Tribes are competing for the right to use water in No Name Creek. Three issues are presented: (1) does the non-Indian purchaser of an Indian allotment acquire the Indian's reserved water rights; (2) what is the scope of the Indians' reserved rights; and (3) may a State allocate surplus reservation water among non-Indians?

We first put these issues in perspective.

History Of Indian Law

Nineteenth century federal policy was to isolate the Indians on reservations. The government forced these "weak and defenseless people" onto large tracts of land that it held for them in trust.[1] *McClanahan* v. *Arizona State Tax Commission*, 411 U.S. 164, 174 (1973) (quoting *Carpenter* v. *Shaw*, 280 U.S. 363, 367 (1930)).

Toward the end of the century, Congress changed federal Indian policy from one of isolation to one of assimilation. The Indians were to learn farming and to be integrated into non-Indian society. Pursuant to the General Allotment Act of 1887, individual Indians were granted parcels of reservation

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* Of the Central District of California

[1] *See* J. Kinney, *A Continent Lost — A Civilization Won* 27-80 (1975); U.S. Dep't. of the Interior, *Federal Indian Law*, 152-57 (1958).

land in fee.[2] 24 Stat. 388, (1887) (codified at 25 U.S.C. §§331, 334, 348, 349, 381 (1976)). Unallotted reservation land was then opened for entry and settlement. *See, e.g.*, Act of May 29, 1908, Pub. L. No. 60-157, ch. 217, 35 Stat. 458; Act of Mar. 22, 1906, Pub. L. No. 59-61, ch. 1126, 34 Stat. 80.

Nearly 50 years later, Congress retreated from the policy of assimilation. Undistributed reservation lands were returned to trust status and tribal self-government was encouraged under the Indian Reorganization Act of 1934. Pub. L. No. 73-383, ch. 576, 48 Stat. 984 (1934) (codified in scattered sections following 25 U.S.C. §461 (1976)).

History Of The Colville Reservation

In 1871 the predecessors of the Colville Confederated Tribes had no treaty with the United States and, consequently, no reservation.[3] These Indians were contemporaneously described as "good farmers, [who] raise extensive crops, make good improvements, and own stocks of cattle and horses." [1871] *Report of the Commissioner of Indian Affairs,* 277.

After the Civil War, settlers had begun to encroach on Indian lands. The Farmer in Charge at Fort Colville reported that violence was likely unless a reservation was established to protect the Indians' interest. *Id.* In response to a request from

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[2] The Allotment Act responded to complex pressures. Westward expansion had recently been completed and the pressure of land hungry settlers on Indian lands was increasing. For some, the Act was a means to open new land for settlement. For others, it seemed the only way to protect the Indians from complete landlessness. It also was designed to promote individualism, industry and other values regarded as civilized. *See* D. Otis, *The Dawes Act and the Allotment of Indian Lands,* 8-32 (2nd ed. 1973).

[3] The Colville Confederated Tribes included the Methow, Okanagon, Sampoil, Nespelem, Lake, and Colville Tribes. *See, Confederated Tribes of the Colville Reservation* v. *United States,* 4 Ind. Cl. Comm. 151 (1956); I. Kappler, *Indian Affairs and Treaties,* 915 (2d ed. 1904). In this opinion, they will be referred to as the Tribe or the Colvilles.

the Commissioner of Indian Affairs, President Grant created the Colville Reservation. Executive Order of July 2, 1872, *reprinted in* 1 Kapler, *Indian Affairs, Laws and Treaties,* 915-16. (2nd ed. 1904).[4] Twenty years later, the northern half of the reservation was taken from the Indians and opened for entry and settlement.[5]

In 1906 Congress ratified an agreement with the Colvilles which provided for distribution of reservation lands to the Indians pursuant to the Allotment Act and for disposition of the remainder by entry and settlement. Act of Mar. 22, 1906, Pub. L. No. 59-61, ch. 1126, 34 Stat. 80. The agreement was effectuated by Presidential proclamation in 1916.[6] 39 Stat. 1778.

In 1917, a row of seven allotments was created in the No Name Creek watershed. Walton, a non-Indian, now owns the middle three, numbers 525, 2371 and 894.[7] The United States holds the others in trust for the Colville Indians. Allotments

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[4] Indians who did not live on the land reserved for them were compelled to leave valuable tracts on which they had made extensive improvements and move to the reservation. [1872] *Report of the Commissioner of Indian Affairs,* 62.

[5] Approximately 1.5 million acres were returned to the public domain. Act of July 1, 1892, 27 Stat. 62.

[6] The reservation remained open for settlement until 1934, when the Secretary of the Interior "temporarily" withdrew the surplus lands pursuant to the Reorganization Act. Congress permanently restored those lands to the beneficial use of the Tribe in 1956. Act of July 24, 1956, Pub. L. No. 84-772, ch. 684, 70 Stat. 626. In passing that Act, Congress acknowledged that the Indians' consent to opening the reservation for settlement was of questionable validity. *See* H.R. Rep. No. 2080, 84th Cong., 2nd Sess. 2 (1956).

[7] He bought the allotments in 1948 from an Indian who was not a member of the Tribe and who had begun to irrigate the land by diverting water for 32 acres from No Name Creek. He immediately procured a permit from Washington State to irrigate 65 acres by diverting up to 1 cu. ft. per second "subject to existing rights." Walton now irrigates over 100 acres.

526 and 892 are north of Walton's property and allotments 901 and 903 are south. Allotments 892, 901 and 903 are held for heirs of the original allottees, but the Tribe has a long-term lease. Allotment 526 is beneficially owned by the Tribe.[8] *See* Appendix, a map of the area. (See, Appendix I to this Petition)

No Name Creek Water System

No Name Creek is a small spring-fed creek which flows south into Omak Lake. The lake has no outlet and is saline. The No Name hydrological system, consisting of an underground aquifer and the creek, is located entirely on the Colville Reservation.

The aquifer lies under the Indians' northern allotments and the northern tip of Walton's allotment, number 525. No Name Creek originates on the southern tip of the Indians' allotment number 892 and flows through Walton's allotments and the Indians' southern allotments.

Fishing Grounds

Salmon and trout were a traditional food for the Colville Indians, but the salmon runs have been destroyed by dams on the Columbia River. In 1968, the tribe, with the help of the Department of the Interior, introduced Lahonton cutthroat trout into Omak Lake. The species thrives in the lake's saline water, but needs fresh water to spawn. The Indians cultivated the creek's lower reach to establish spawning grounds but irrigation use depleted the water flow during spawning season. The federal government has given the Indians fingerlings to maintain the stock of trout.

The Case Below

In 1970 the Indians sued Walton, alleging that his use of No Name Creek water violated their rights.

The trial court calculated that the Indians have a potential right to 912 acre feet of water to irrigate their 228 irrigable acres but refused to award water from the No Name

[8] We assume that none of the Colvilles' allotments ever passed from Indian ownership.

Creek system for their northernmost allotment, number 526, until they showed that water for it was unavailable from another source, Omak Creek. The Indians' right to No Name water was therefore reduced to 666.4 acre feet.

The court found that the Indians were irrigating only 107.2 of the irrigable acres on their other three allotments. This left an additional 237.6 acre feet available for appropriation by non-Indians, subject to the Indians' superior right.

The court also held that the Indians were potentially entitled to use water to propagate trout but refused to award water for that purpose. It concluded that spawning was unnecessary because fingerlings were provided free by the federal government.

By post-trial motion, the Indians sought permission to use some of their irrigation water for trout spawning. The motion was granted and the Tribe has since pumped aquifer water from their wells into No Name Creek during spawning season.

Finally, the court decided that Washington State could regulate No Name water that was not reserved for the Indians or that they were not using.

Walton, the Tribe and the State appeal parts of the decision. *Colville Confederated Tribes* v. *Walton*, 460 F.Supp. 1320 (E.D. Wash. 1978).[9]

Judge Neill's analysis reflects his extensive knowledge of the background and facts of this case and his thoughtful examination of the issues. We adopt his opinion and add the following analysis.

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[9] The Tribe asked the United States to intervene on its behalf. Instead, the Justice Department filed a separate suit against Walton, based on the theory that the Secretary of the Interior has exclusive jurisdiction over all the water on the reservation. The trial court consolidated the proceedings *sua sponte*. The United States filed an appeal from the decision and the Tribe moved "not to be bound" by any ruling on *U.S.* v. *Walton*, No. 79-4619. The United States has since dropped its appeal and we deny the Tribe's motion.

I. Walton's Water Rights

The primary issue is whether Walton acquired Indian reserved water rights with his allotments. We conclude that he did not for two reasons: (1) no water was originally reserved for non-Indian use and (2) the history and purpose of the Allotment Act demonstrates that Congress would not have intended non-Indians to acquire reserved rights.[10]

The Winters Doctrine

The Supreme Court held in 1908 that when the United States reserved federal land for the Indians, it impliedly reserved enough water to accomplish the purposes for which the reservation was created.[11] *United States* v. *Winters*, 207 U.S. 564, 576-77 (1908). Reserved water rights have priority from the date the reservation was created and, unlike water rights created under the laws of western States, expand to meet

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[10] In addition, some pragmatic considerations support our conclusion: (1) The government has greater control over the Indian's use of reserved water. A Congressional appropriation is usually necessary for any major Indian project because private financing is virtually unavailable. *See generally*, A. Sarkin, *American Indians and Federal Aid* (1971). Non-Indians might well be able to obtain private financing, however; (2) a large portion of most reservations is now owned by non-Indians. Transference of reserved rights would create serious problems among them. On the reservation, the appropriative system which, in some form, governs water rights in all the arid western states, would be eliminated and a quasi-riparian system instituted. For a discussion of riparian and appropriative systems, *see*, W. Hutchins, *Water Rights Laws in the Nineteen Western States*, chs. 8, 10 (1977); (3) non-Indian reservation property owners could oust nearby off-reservation owners from their state-created water rights and, perhaps, allotment owners could oust other reservation owners whose title derives from a homestead. *See Colville Confederated Tribes* v. *Walton*, 460 F.Supp. 1320, 1328-29 (E.D. Wash. 1978).

[11] The *Winters* doctrine applies to reservations created by treaty or executive order. *Arizona* v. *California*, 373 U.S. 546, 598 (1963).

future needs.[12] *Arizona* v. *California*, 373 U.S. 546, 600-601 (1962).

In a recent case involving reserved forest lands, the Supreme Court declared that the *Winters* doctrine must be narrowly construed:

> Where water is necessary to fulfill the very purposes for which a federal reservation was created, it is reasonable to conclude, even in the face of Congress' express deference to state water law in other areas, that the United States intended to reserve the necessary water. Where water is only valuable for a secondary use of the reservation, however, there arises the contrary inference that Congress intended, consistent with its other views, that the United States would acquire water in the same manner as any other public or private appropriator.

United States v. *New Mexico*, 438 U.S. 696, 702 (1977).

We believe the New Mexico rule applies to non-Indian allotment owners. Indian reservations were created to isolate the Indians, to establish them in a homeland, and to convert them into a "pastoral and civilized people." *Winters* v. *United States*, 207 U.S. 564, 576 (1908). *See generally* J. Kinney *A Continent Lost — A Civilization Won*, 27-80, (1975). Reserving water for non-Indians is not necessary to fulfill any of these purposes and is inconsistent with the basic nineteenth century Indian policy of isolation.

The Allotment Act

Even if the original reservation of water rights comprehended use by non-Indians, Congress has taken no action to transfer those rights to them.

Termination or diminution of Indian rights requires express legislation or a clear inference of Congressional intent gleaned from the surrounding circumstances and legislative history. *See Mattz* v. *Arnett*, 412 U.S. 481, 504-505 (1972);

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[12] For a general discussion of Western water rights law, *see* W. Hutchins, *Water Rights Laws in the Nineteen Western States* (1977), especially chs. 8, 10.

Bryan v. *Itasca County*, 426 U.S. 373, 392-93 (1975). The Allotment Act does not provide for the transfer of Indian water rights to non-Indian allotment purchasers. It was passed in 1887, over 20 years before the *Winters* doctrine was announced. Therefore, Congress could not have intended to provide for the transfer of reserved rights.[13]

The available evidence indicates that Congress would have disapproved transferability as inconsistent with the purposes of the Allotment Act. Permitting non-Indians to acquire reserved water rights could have only two effects: (1) to induce non-Indians to purchase allotments rather than to homestead off the reservation[14] and (2) to enable the Indians to sell their land for a higher price.[15] Each is inconsistent with the dominant purpose of the Allotment Act. Indians were

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[13] The only reference to water rights in the Act is §7:

> In cases where the use of water for irrigation is necessary to render the lands within any Indian reservation available for agricultural purposes, the Secretary of the Interior is authorized to prescribe such rules and regulations as he may deem necessary to secure a just and equal distribution thereof among the Indians residing upon any such reservation. . . .

25 U.S.C. §381 (1976). This provision implies that water rights were held in federal trust and not allotted.

[14] Proponents of the Allotment Act hoped to integrate reservations so the Indians could learn farming skills from their non-Indian neighbors. *See, e.g.*, 17 Cong. Rec. 1762-63 (1886). Integregation could be accomplished by allowing non-Indians to homestead on the reservation. Encouraging the sale of allotments was unnecessary.

[15] The extra money could be considered additional capital. Senator Dawes declared that an Indian could sell his allotment and go into business. *Report of the Secretary of the Interior, Proceedings of Mohonk Lake Conference*, H.R. Exec. Doc. No. 75, 49th Cong. 2d Sess. 993 (1887). Congress recognized that it could not force the Indians to become farmers, but it neither intended nor seriously considered the possibility that they might be become businessmen. The Act was intended to accomodate but not to facilitate their entrepreneurial ventures.

given fee ownership principally so they could keep their land, make their homes on it, and become self-sufficient farmers.

This is evidenced by the provision that allotted lands be held in federal trust for 25 years. 25 U.S.C. §348 (1976). Felix Cohen, in his authoritative *Handbook of Federal Indian Law*, states that Congress was motivated to maintain the trust relationship by

> the desire to protect the Indian against sharp practices leading to Indian landlessness, the desire to safeguard the certainty of titles, and the urge to continue an important basis of governmental activity [on the Indian's behalf].

F. Cohen, *Handbook of Federal Indian Law*, 221 (1940); U.S. Dept. of Interior *Federal Indian Law*, 788-89 (1958).

The extended trust period was established to give the Indians time to learn the agricultural skills necessary to make their land productive and to settle on it. Congress expected that, after 25 years, the threat of exploitation and Indian landlessness would have passed. *Report of the Secretary of the Interior, Proceedings of Mohonk Lake Conference*, H.R. Exec. Doc. No. 75, 49th Cong. 2d Sess. 993-94 (1887) (Senator Dawes' presentation). It would have been inconsistent for Congress to deter non-Indian acquisition of allotments by imposing a federal trust and yet to encourage non-Indian acquisition by offering better water rights than were available to homesteaders. *See California Oregon Power Co.* v. *Beaver Portland Cement Co.*, 295 U.S. 142, 162 (1935) (patent issued under homestead law carries no water rights).

We conclude that Walton acquired no reserved water rights.[16] His rights are State-created and are therefore junior to the Indians' rights.[17]

The Indians' Water Rights

The trial court found that 1,000 acre feet of water per year should be available from the No Name Creek system and that four acre feet per year are required to irrigate one acre of land. These findings are not clearly erroneous.

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[16] Our decision is consistent with *United States* v. *Powers*, 305 U.S. 527 (1939). The *Powers* court expressly reserved the issue of transferability:

> We do not consider the extent or precise nature of respondents' [non-Indians'] rights in the waters.

Id. at 533.

In *Powers*, the Indians and the government constructed a system to irrigate about 20,000 acres. When the reservation was subsequently allotted, some Indians received unirrigated land. A private irrigation company constructed another system which served both Indian and non-Indian owned allotments. The government sued to enjoin any diversion of water into this and other systems. The Court refused to grant that injunction declaring that the Indian allottees served by the private system had a right to water. *Id.* at 532. Our reading of *Powers* is based on a careful study of the District Court, Court of Appeals, and Supreme Court opinions.

In *United States* v. *Ahtanum Water Dis.*, 236 F.2d 321 (1956), this court said in dictum that *Powers*

> holds that white transferees of such fee patented Indian allotments were equally with individual allottees beneficially entitled to distribution of the waters diverted for the Indian irrigation system.

Id. at 342. That reading was erroneous.

[17] Appropriative rights acquired before the reservation was created have priority over reserved rights. *Winters* v. *United States*, 207 U.S. 564 (1908). Walton may "tack" on his predecessors', including any Indian's, period of continuous use, but the earliest diversion of water for his land was made by his grantor between 1942 and 1948.

The court held that the Colvilles have a potential right to use 912 acre feet of water from the system, but deferred their right to use water for irrigation of allotment 526 and for trout propagation. We affirm that ruling.[18]

Allotment 526

There are two possible sources of water for the Indians' northernmost allotment, number 526: the No Name aquifer and Omak Creek.[19] The trial court held that the Indians must use water from Omak Creek for allotment 526, if any is available, before they may pump water from the aquifer.

Winters, supra, 207 U.S. 546, gives the Indians a reserved right to water, but not the absolute right to determine the source. The Indians have not shown that water is unavailable from Omak Creek or that its use involves significant disadvantages.[20] Under the circumstances we find that the trial court properly required the Indians to seek water initially from Omak Creek for allotment 526.

Trout Propagation

The trial court held that maintaining fishing grounds was one purpose for which the Colville Reservation was created, but refused to grant water for spawning because it was un-

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[18] The Colvilles argue that water rights were not allotted but were kept in trust for them by the federal government, that individual Indian allottees have a right to share in the tribal right, and that this right is not diminished when allotments are sold to non-Indians. We reject this theory. The Tribe insists, in effect, that the Indians' water rights must be calculated on all the acres they ever owned, not on those they now own. In *California* v. *Arizona,* 373 U.S. 546 (1962), the Court calculated the quantity of water reserved for the Indians from the "practicably irrigable acreage." *Id.* at 600-601. If the Indians do not own the land it is not practicably irrigable by them.

[19] Omak Creek and No Name Creek have no surface connection.

[20] The Indians are deprived of the use of wells drilled on allotment 526 but those were constructed with the understanding that this litigation would be unaffected.

necessary. We must first decide whether water was reserved for trout propagation and then whether its use is necessary.

Insofar as possible, we apply the *New Mexico* test to determine the scope of the Indians' water rights. *United States* v. *New Mexico, supra,* 438 U.S. at 702. We cannot define the purposes of an Indian reservation as narrowly as those of a national forest, however, for three reasons: (1) the specific purposes of an Indian reservation were often unarticulated;[21] (2) the general purpose, to provide a home for the Indians, is a broad one and must be liberally construed;[22] and (3) the reservation was created by the government for the Indians, not on its own behalf.[23] To identify the purposes of the Col-

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[21] For example, the order creating the Colville reservation read:

> It is hereby ordered that . . . the country bounded on the east and south by the Columbia River, on the west by the Okanagan River, and on the north by the British possessions, be, and the same is hereby, set apart as a reservation for said Indians, and for such other Indians as the Department of the Interior may see fit to locate thereon.

Executive Order of July 2, 1872, *reprinted in* 1 Kappler, *Indian Affairs and Treaties,* 916 (2d ed. 1904). Reservations were commonly created with similar language. See U.S. Dept. of the Interior, *Federal Indian Law,* 613-22 (1958). The President's orders responded to requests from officers in the Department of the Interior but it is difficult to identify or to know how much weight to give to their purpose.

[22] *See United States* v. *Winans,* 198 U.S. 371, 381 (1905) and cases cited in fn. 24, *infra.* The rule of liberal construction should apply to reservations created by Executive Order. *See Arizona* v. *California,* 373 U.S. 546, 598 (1963). Also, Congress envisioned agricultural pursuits as only a first step in the "civilizing" process. *See, e.g.,* 11 Cong. Rec. 905 (1881). This vision of progress implies a flexibility of purpose.

[23] This reason has three aspects: (1) The principle of exempting the Indians from state jurisdiction. *Rice* v. *Olson,* 324 U.S. 786, 789 (1945). This policy may be weakening. *See, Colorado River Water Conservancy District et al* v. *United States* 424 U.S. 800 (1976) (state courts have jurisdiction over Indian reserved water rights); (2) state jurisdiction

ville Reservation, we consider not only the document of creation, but the circumstances surrounding its creation and the history of the Indians for whom it was created. We also consider their need to maintain themselves under changed circumstances.[24] *See United States* v. *Winans*, 198 U.S. 371, 381 (1905).

The Colville Indians traditionally fished for both salmon and trout. Like other Pacific Northwest Indians, fishing was of economic and religious importance to them. *See Washington* v. *Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. 658, 665 (1978); *United States* v. *Winans, supra*, 198 U.S. 371; [1871] *Report of the Commissioner of Indian Affairs*, 277. Their old fishing grounds have been destroyed by dams on the Columbia River and new

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continues over federal lands absent a specific prohibition but the establishment of an Indian reservation preempts state jurisdiction over Indians, tribes, and Indian property. *Compare Kleppe* v. *New Mexico*, 426 U.S. 529, 542-45 (1976) with *Bryan* v. *Itasca County*, 426 U.S. 373, 376 n. 2 (1976). *See* also, *White Mountain Apache Tribe* v. *Bracker*, _____ U.S. _____, 48 U.S.L.W. 4897 (June 27, 1980); *Central Machinery Co.* v. *Arizona State Tax Comm'n*, _____ U.S. _____, 48 U.S.L.W. 1930 (June 27, 1980) (preemption analysis in Indian law cases); (3) publicly owned federal lands can be dealt with freely but Indian property rights are protected. *Nat'l. Water Comm'n., Water Policies for the Future — Final Report to the President and to the Congress of the United States*, 477 (1973). *See Delaware Tribal Business Comm.* v. *Weeks*, 430 U.S. 73, 83-85 (1977).

[24] *See Alaska Pacific Fisheries* v. *United States*. 248 U.S. 78 (1918) (exclusive right to fish implied because necessary for self-sustaining community); *United States* v. *Shoshone Tribe*, 304 U.S. 111 (1938) (reservation for "absolute and undisturbed use and occupation" includes ownership of minerals and standing timber); *Menominee Tribe of Indians* v. *United States*, 391 U.S. 404, 406 (1968) (reservation "for a home" includes hunting and fishing rights); and *United States* v. *Finch*, 548 F.2d 822, 832 (9th Cir. 1976) (U.S. intended to reserve right of Indians to sustain themselves "from any source of food which might be available").

grounds have been established in Omak Lake by planting a non-indigenous trout.

The issue is difficult, but we agree with the trial court that the maintenance of fishing grounds was one purpose for creating the Colville Reservation and that, under the circumstances, this includes the reestablishment as well as the preservation of grounds.

Water For Spawning

The trial court refused to award the Indians water for spawning, finding it unnecessary because the federal government provided fingerlings. In *Cappaert* v. *United States,* the Supreme Court declared:

> The implied-reservation-of-rights-doctrine, however, reserves only that amount of water necessary to fulfill the purposes of the reservation, no more.

426 U.S. 128, 141 (1976).[25]

The Indians contend that natural spawning is necessary to produce stronger fish. The trial court rejected this contention. The Colvilles failed to show a genuine need to propagate trout by spawning, planting serves their purposes. We affirm the court's conclusion.[26]

Transfer of Water Use

The court granted the Indians' post-trial motion to use irrigation water for spawning purposes. We hold that this change of use is proper.

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[25] The *Cappaert* test, like the *New Mexico* test, may apply less rigidly in Indian cases.

[26] We recognize a problem related to "inverse condemnation." *See United States* v. *Clarke,* _____ U.S. _____, 48 U.S.L.W. 4258 (March 18, 1980) (no state inverse condemnation of Indian lands). We are wary of allowing the state or federal government to "take" the Indians' water informally by obviating the need for it but we feel constrained by *Cappaert* to hold as we do here, especially because the trout were introduced into Omak Lake by planting.

The Special Master in *Arizona* v. *California*, 373 U.S. 546 (1962), determined that the purposes for which the reservation was created governed the quantification of reserved water, but possibly not its use.

> This [method of quantifying water rights] does not necessarily mean, however, that water reserved for Indian Reservations may not be used for purposes other than agricultural and related uses. . . . The measurement used in defining the magnitude of the water rights is the amount of water necessary for agriculture and related purposes because this was the initial purpose of the reservation, but the decree establishes a property right which the United States may utilize or dispose of for the benefit of the Indians as the relevant law may allow.

Report from Simon H. Rifkind, Special Master, to the Supreme Court 265-66 (Dec. 5, 1960). The Department of the Interior has taken the position that a change of use is permissible. *See* Memorandum from Solicitor of the Department of the Interior to the Secretary of the Interior, Feb. 1, 1964 (use of reserved water for recreation and housing development).

The Indians must be allowed to use reserved water for new purposes. Water was reserved for them because they lacked the skills to compete successfully for water under state appropriative schemes.[27] *See, Arizona* v. *California, supra*, 373 U.S. at 599-600; *Winters* v. *United States*, 207 U.S. at 576-77. If their reserved water could only be used for purposes contemplated when the reservation was created, the Indians would be trapped in the nineteenth century. Their land could not be put to its most productive use and they could not pursue new economic opportunities.

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[27] Once acquired, state appropriative rights are not easily lost and a change of use will be permitted absent injury to others. *See* I.W. Hutchins, *Water Rights in the Nineteen Western States*, 623 *et seq.* (1977) (general principles); *Id.* Vol. III at 588-90 (Washington law); Wash. Rev. Code §90.03.380 (1980). It would be very difficult for the Indians to "break in" to the appropriative system once the chain of priorities is established.

Non-Indians are not disadvantaged by this change of use. The Indians are entitled to use a quantity of water. How they use it does not affect the amount remaining for appropriation by others. They may use it for agriculture, for commercial venture, or they may forego its use without infringing on the rights of non-Indians.[28]

Recent Supreme Court cases strictly limiting reserved water rights are concerned primarily with quantification. *See, e.g., United States* v. *New Mexico, supra,* 438 U.S. 696. Open-ended water rights are a growing source of conflict and uncertainty in the arid west. Until their extent is determined, state-created water rights cannot be relied on by property owners. *See Public Land Law Review Commission, One Third of the Nation's Lands,* 144 (1970).

Limiting reserved rights to the original purposes of the reservation is necessary to the process of quantification because the right must be defined before the amount of reserved water can be calculated. Imposing limits on the use of reserved water, however, would serve no purpose except to frustrate the Indians' economic development. We conclude that the Supreme Court has not curtailed the Indians' use of their reserved water and we decline to do so.

III. State Regulation Of Water

The trial court determined that Washington is not preempted from regulating reservation water which is not reserved for or used by the Indians. We hold that the State may apportion this water among non-Indians, but do not decide whether its regulatory authority extends further.[29]

Preemption depends on (1) Congressional intent and (2) the extent to which state laws interfere with tribal sovereignty.

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[28] Although the Indians might be able to use more of their reserved water for unintended than intended purposes, we consider this possibility remote.

[29] For example, we do not decide whether a state may enforce its water quality regulations on the reservation.

See, McClahanan v. *Arizona State Tax Commission, supra,* 411 U.S. at 171-72.

Congress has indicated no preemptive intent. The basic statutory scheme is that water rights should be acquired under state law, subject to limited federal reserved rights. *See California-Oregon Power Co.* v. *Beaver Portland Cement Co.*, 295 U.S. 142, 160-63 (1935). Congress made only one specific reference to water rights in the Allotment Act:

> the Secretary of the Interior is authorized to prescribe such rules and regulations as he may deem necessary to secure a just and equal distribution thereof among the Indians residing upon any such reservation. . . .

25 U.S.C. §381 (1976). This provision demonstrates no intent to affect state authority over non-Indians.

The second facet of the preemption test, the effect of state laws on tribal sovereignty, was most succinctly discussed by the Supreme Court in *Williams* v. *Lee*:

> Essentially, absent Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them.

358 U.S. 217, 220 (1959).[10] State allocation of surplus water among non-Indians has no significant impact upon the tribe.

The trial court correctly concluded that state allocation of surplus water among non-Indians was not preempted. *Compare, White Mountain Apache Tribe* v. *Bracker,* _____ U.S. _____, 48 U.S.L.W. 4897 (June 27, 1980); *Central Machinery Co.* v. *Arizona State Tax Commission,* _____ U.S. _____, 48 U.S.L.W. 1950 (June 27, 1980).

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[10] The state's interest in governing non-Indians must be considered:

> [N]otions of Indian sovereignty have been adjusted to take account of the State's legitimate interests in regulating the affairs of non-Indians.

McClanahan v. Arizona State Tax Comm'n., 411 U.S. 164, 171 (1973).

Tribal Preemption

During the course of this litigation, the tribe enacted a water code that purports to regulate all water on the reservation. We hold that this code does not preempt state law.[31]

In *Washington* v. *Confederated Tribes of the Colville Reservation,* the Supreme Court found no tribal preemption in a similar situation:

> There is no direct conflict between the state and tribal schemes, since each government is free to impose its taxes without ousting the other. . . . And, as already noted, we perceive no intent on the part of Congress to authorize the Tribes to preempt otherwise valid state taxes.

_____ U.S. _____, 100 S.Ct. 2069, 2084 (1980).

The Colville Court recognized that conflict was possible when state and tribal schemes were for "distributive or regulatory purposes." Although the present case presents a problem of distribution, there is no conflict.

The tribe is not prevented by state law from regulating its reserved water and it has no legitimate interest in regulating the non-Indians' use of surplus water.[32] State created water rights are junior to and therefore not in competition with the Indians' rights. The tribe's water code cannot oust state law because the two distribution schemes are compatible.

The decision of the District Court is AFFIRMED.

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[31] The code, by its own terms, is not effective until it is approved by the Secretary of the Interior. The Secretary has not approved it but has declared that the Department will soon issue its own water regulations for the Colville reservation. We do not decide whether those regulations will preempt state law.

[32] The Tribe must recognize the validity of state-created rights in surplus water. *California Oregon Power Co.* v. *Beaver Portland Cement Co.*, 295 U.S. 142, 162 (1935) (water severed from public lands and available for appropriation absent prior federal reservation). Its regulatory authority over apportionment encompasses only reserved water and, even there, it can oust state-created rights only by actual use.

APPENDIX D

UNITED STATES DISTRICT COURT,
E. D. WASHINGTON.

Nos. C-3421, C-3831.

COLVILLE CONFEDERATED TRIBES, *Plaintiff,*

v.

BOYD WALTON, JR., et ux., et al., *Defendants.*

STATE OF WASHINGTON, *Defendant-Intervenor.*

UNITED STATES of America, *Plaintiff,*

v.

WILLIAM BOYD WALTON et ux., et al., and the State of Washington, *Defendants.*

Oct. 25, 1978.

William H. Veeder, Alexandria, Va., Stephen L. Palmberg, Colville Confederated Tribes, Nespelem, Wash., for Colville Confederated Tribes.

Slade Gorton, Atty. Gen., Charles B. Roe, Jr., Sr. Asst. Atty. Gen., Laura E. Eckert and Robert E. Mack, Asst. Attys. Gen., Olympia, Wash., for State of Wash.

James J. Gillespie, U. S. Atty., and Robert M. Sweeney, Asst. U. S. Atty., Spokane, Wash., for the U. S.

Nansen & Price, Omak, Wash., for Waltons.

Memorandum Opinion

NEILL, Chief Judge.

In these consolidated cases plaintiffs seek declaratory and injunctive relief relating to the rights to waters of a very small waterway located entirely within the exterior boundaries of the Colville Indian Reservation in north central Washington.

As the result of this extended litigation this formerly nameless waterway has acquired the appellation "No Name Creek". Because the surface water of No Name Creek has a hydraulic relationship with the underlying aquifer, these actions include rights to both surface and ground waters of the creek basin.

The Colville Confederated Tribes (Tribe) brought suit in 1970 to enjoin defendants Walton, who are not Indians, from using No Name Creek waters, claiming that the tribal reserved water rights were superior to Waltons' rights and that there was insufficient water to satisfy both the Tribe's and Waltons' needs. The State of Washington intervened asserting its authority to grant water permits on reservation lands. The United States brought suit against Waltons and the State of Washington, alleging identical issues of reserved water rights. The actions have been consolidated.

This Court has jurisdiction in Cause No. 3421 under 28 U.S.C. §1362 and jurisdiction in Cause No. 3831 under 28 U.S.C. §1345. In these actions the Court must determine first, the relative water rights of the Tribe and defendants Walton, and second, the relative authority of the Tribe, the United States, and the State of Washington to regulate, allocate and control the subject water.

Background[1]

No Name Creek and its basin lie entirely within the Colville Indian Reservation. The Reservation was established by executive order on July 2, 1872, as a home for various bands of Indians now known as the Colville Confederated Tribes. It is located in a semi-arid and mountainous region in north central Washington. No Name Creek, which originates on Allotment No. 892 north of the Walton property, is spring fed, flows southerly approximately three miles and empties into Omak Lake. The lake is composed of saline water, unsuitable for irrigation purposes.

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[1] See appendix for agreed facts and map.

Water from the No Name Creek basin presently serves seven parcels of land, all at one time allotted to individual Indians. The only lands within the basin presently held by non-Indians are the three allotments owned in fee by Waltons, each of which borders No Name Creek. The other four allotments in the basin are either held in trust by the United States for the heirs of the allottees and leased to the Tribe or are held in trust directly for the benefit of the Tribe. Historically, the two allotments to the north of Waltons were irrigated with surface waters from Omak Creek located on the northernmost allotment, while the two allotments south of Waltons were irrigated with waters diverted from No Name Creek.

Defendants Walton claim water rights on two theories. First, they claim rights as successors to Indian allottees. Second, they claim appropriative rights perfected under state law. Using water diverted from No Name Creek and water pumped from an irrigation well drilled in the 1970's, Waltons are presently irrigating 105 acres.

Waltons' first claim is based on a tracing of the title to their land through mesne conveyances back to the original Indian allottees. The allotments now owned by the Waltons passed from Indian ownership in 1942. The former Indian allottees had not irrigated these lands. In 1946, this land was again sold, and although the purchaser was Indian, he was not a member of the Colville Tribes. When Walton bought the property in 1948, approximately 32 acres were under irrigation. Based upon the right to use of water by the Indian allottees, defendants Walton claim to have succeeded to a right to irrigate all of their irrigable acreage or, alternatively, to a right to irrigate a minimum of the 32 acres which were under irrigation at the time of purchase.

Waltons' claim to an appropriative water right is based on a state certificate. Immediately after purchasing the land in 1948, Walton applied to the State for a permit to divert 3 cu. ft. per second from the creek to irrigate 75 acres. Pursuant to

this application the state in 1950 issued Walton a certificate of water right to irrigate 65 acres by diverting 1 cu. ft. per second. This certificate was granted "subject to existing rights".

The Tribe bases its claim to water on the doctrine of reserved water rights. It asserts the right to irrigate the 228 irrigable acres contained in the four Indian-held allotments within the No Name Creek Basin. In addition, the Tribe claims the right to sufficient water to support spawning grounds in the creek for Lahontan cutthroat trout.

Presently the Tribe is irrigating 157 of the 228 Indian-held irrigable acres in the basin. Some of these acres historically were irrigated from the surface water of Omak Creek and No Name Creek. In 1975 the Tribe initiated an extensive irrigation project in the basin. Wells were drilled on the northern allotments to provide irrigation waters for the northern acres, and some well water was pumped into No Name Creek to serve the needs of the two southern allotments. The crops grown on these allotments are used to support the Paschal Sherman Indian School.

In 1968 the Tribe with the aid of the United States Department of Interior introduced Lahontan cutthroat trout into Omak Lake. At that time this species was classified as endangered. Although these trout thrive in salt water, they require fresh water spawning grounds. No Name Creek is the only fresh water source into the lake. The Tribe rerouted the course of lower No Name Creek to improve access from the lake to the fresh water spawning grounds. These trout are also artifically propagated in a federal hatchery in Winthrop, Washington and made available to the Tribe. The Tribe, however, claims a reserved right for water to maintain the spawning grounds in the creek.

The Tribe and the United States, as trustee, seek to enjoin Waltons' interference with tribal use of No Name Creek Basin waters. They also seek a declaration that the State of Washington has no jurisdiction to issue water permits within the boundaries of the Reservation and that the permits heretofore issued to Waltons are null and void.

This litigation requires a determination of four complex issues of Indian water rights: 1) what effect the General Allotment Act has on Indians' reserved water rights; 2) whether a non-Indian grantee of an Indian allotment may succeed to his Indian grantor's reserved rights; 3) the amount of water available to each party in this action; and 4) whether a state may issue water permits to non-Indian landowners within the boundaries of an Indian reservation.

Effect Of The General Allotment Act On Reserved Water Rights

Waltons claim a water right based on the prior status of their property as Indian allotments. They assert that the General Allotment Act, 25 U.S.C. §331 *et seq.*, passed to the individual Indian allottees a portion of the reservation's reserved water, which became appurtenant to the allotted land and was conveyed when the land was sold. An analysis of the effect of the General Allotment Act on the allottee's water rights requires an understanding of the origin of the reserved water rights doctrine, the scope of that doctrine, and the purpose of the General Allotment Act.

In *Winters* v. *United States*, 207 U.S. 564, 28 S.Ct. 207, 52 L.Ed. 340 (1908), the Supreme Court established the doctrine of implied reservation of water. The Court determined that when the United States set aside lands as Indian reservations, it intended to provide a suitable homeland for the Indians so they could change from their nomadic ways to "become a pastoral and civilized people." *Id.* at 576, 28 S.Ct. at 211. As recently noted by the Supreme Court, "It can be said without overstatement that when the Indians were put on these reservations they were not considered to be located in the most desirable area of the Nation." *Arizona* v. *California*. 373 U.S. 546, 598, 83 S.Ct. 1468, 1497, 10 L.Ed.2d 542 (1963). The creators of the western reservations were aware of the arid nature of the region, and of the fact that water is "essential to the life of the Indian people and to the animals they hunted and the crops they raised." *Id.* at 599, 83 S.Ct. at 1497. When Congress placed the Indians on reservations, it

took from them "the means of continuing their old habits" and therefore must have intended to give them "the power to change to new ones." *Winters, supra,* 207 U.S. at 577, 28 S.Ct. at 212. Because the reservation lands were arid and were "practically valueless" without irrigation, the *Winters* Court held that the Indians were entitled to an adequate supply of water.

[1-5] As defined in *Cappaert* v. *United States,* 426 U.S. 128, 138, 96 S.Ct. 2062, 2069, 48 L.Ed.2d 523 (1976), the *Winters* reserved water rights doctrine provides that upon the establishment of any federal reservation the United States "reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation." The *Winters* reserved water right "vests on the date of the reservation and is superior to the rights of future appropriators." *Id. Winters* rights apply to reservations created by executive order, as well as to those created by treaty or act of Congress. *Arizona* v. *California, supra,* 373 U.S. at 598, 83 S.Ct. 1486. They extend to ground water as well as surface water. *Cappaert, supra,* 426 U.S. at 142-143, 96 S.Ct. 2062. Where the purpose of establishing the reservation was to turn the Indians into an agrarian society, as is the case with the Colville Reservation, the amount of water impliedly reserved is that which would satisfy future as well as present needs, measured in terms of enough water to irrigate "all the practicably irrigable acreage" on the reservation. *Arizona* v. *California, supra,* 373 U.S. at 600, 83 S.Ct. 1468. The reserved rights are open-ended and do not depend on actual use to be maintained. Water is therefore available whenever needed to fulfill the purposes of the reservation. The reserved amount of water must be made available despite inequities to the non-reserved users. *Cappaert, supra,* 426 U.S. at 138, 96 S.Ct. 2062. Therefore, reserved water rights are not lost by laches, estoppel or adverse possession. *See United States* v. *Ahtanum Irr. Dist.,* 236 F.2d 321 (9th Cir. 1956), *cert. denied,* 352 U.S. 988, 77 S.Ct. 386, 1 L.Ed.2d 367 (1957), *rev'd.,* 330 F.2d 897 (9th Cir.), *rehearing denied,* 338 F.2d 307 (9th Cir. 1964),

cert. denied, 381 U.S. 924, 85 S.Ct. 1558, 14 L.Ed.2d 683 (1965).

The General Allotment Act of 1887, (25 U.S.C. §331 *et seq.*) (the Dawes Act), was designed to help reservation Indians assimilate into the dominate culture by authorizing the division of communally-held tribal lands into specific tracts for each of the tribe's members. Unallotted lands within the reservations would then be opened to non-Indians with the apparent intent to promote interaction between the races and to encourage Indians to adopt white ways. *Mattz* v. *Arnett,* 412 U.S. 481, 496. 93 S.Ct. 2245, 37 L.Ed.2d 92 (1973). It was hoped that the Indians would learn to farm their property from such association with white neighbors. Since the Indians were considered unsophisticated and the whites were known to desire increased land holdings, the allotted lands were to be held in trust by the United States for the allottees for twenty-five years, (25 U.S.C. §348) after which a fee patent could issue to the Indians. *Id.* Section 7 of the Dawes Act (25 U.S.C. §381) provides that where water is necessary for irrigation, the Secretary of Interior is authorized to see that the available water is divided in a just and equal manner among the Indians residing on the reservation.

[6-8] This Court concludes, based upon a reading of the relevant cases, that the Dawes Act did not deprive the allottee of his share of the reservation's reserved water. Reserved rights belong to each individual Indian. *United States* v. *Winans,* 198 U.S. 371, 381, 25 S.Ct. 662, 49 L.Ed. 1089 (1905). Under the doctrine, tribal members own the reserved water from the time of the creation of the reservation; at the time a tribal member acquires an allotment, his reserved rights become appurtenant to his land. *United States* v. *Preston,* 352 F.2d 352, 358 (9th Cir. 1965). Thus, as stated in *United States* v. *Powers,* 305 U.S. 527, 532, 59 S.Ct. 344, 83 L.Ed. 330 (1939), when allotments were made, a portion of the waters within the reservation which had been reserved for the equal benefit of the tribal members passed to the allottees.

Alienability Of Reserved Water Rights

As the discussion above indicates, the Indian allottee owns, as appurtenant to his allotment, his proportionate share of the reservation's reserved water. *Preston, supra,* at 358. He retains these rights after he is issued the fee patent to his allotment. *Powers, supra,* at 532, 59 S.Ct. 344. The settled issued of what the Indian allottee owns is distinct, however, from the unresolved issue of what rights the allottee may alienate to a non-Indian.

The parties to this litigation have taken three different stances on this latter issue. Waltons and the State of Washington assert that since *Winters* rights are appurtenant to the Indian allotment, the rights are transferred at the time of the conveyance of the allotment to a non-Indian. The Tribe, on the other hand, contends that *Winters* rights are tribal rights and that Congress, in the Dawes Act, did not intend to divest the Tribe of those rights. The Tribe therefore argues that an allottee may only hold his proportionate share of the tribal rights while holding the land and may not alienate these water rights with his land when he sells the allotment to a non-Indian. The United States takes a middle ground. It asserts that the allottee may sell to a non-Indian a right to that portion of the water which was being put to beneficial use at the time the allotment left trust status and that this transferable water right would have a priority date of the establishment of the reservation.

Although several opinions arguably indicate that reserved water rights appurtenant to an allotment may be conveyed to a non-Indian grantee, this Court finds no clear and binding precedent on the issue.

The Ninth Circuit has held that reserved water rights remain appurtenant to the allotted land when it remains in Indian ownership but is leased to a non-Indian. *Skeem* v. *United States*, 273 F. 93 (9th Cir. 1921). The Court was not faced in that action, however, with the issue of what water rights may be sold.

In another early decision, the Idaho Federal District Court held that the non-Indian purchaser of an Indian allotment located outside the reservation boundary acquired a water right to irrigate the acreage that was under irrigation at the time title passed from the Indians, and such increased acreage as he might with reasonable diligence place under irrigation. *United States* v. *Hibner,* 27 F.2d 909 (D. Idaho 1928). The priority date was found to be the same as that owned by the Indian allottees — the date of the establishment of the reservation. *Id.* at 912. Unlike the Indian, however, whose rights were open-ended, and independent of actual use of the water, the purchaser took with a *Winters* priority date only that amount of water used by the Indian predecessors plus that which he could put to use within a reasonable time. The Court's conclusion was not appealed.

Almost two decades after *Hibner,* the Supreme Court faced the same Indian water rights issues, but avoided resolving those issues by disposing of the case on a procedural ground. *In United States* v. *Powers,* 305 U.S. 527, 529, 59 S.Ct. 344 (1939), the United States sought to enjoin the defendants, non-Indian successors to allottees, from diverting water from above an irrigation project on the reservation. The Government claimed that owners of lands which were not part of the project were not entitled to divert water to the detriment of the project. Although this claim was dismissed by the trial court, it determined that allottees passed to their grantees whatever water rights they possessed. The court then proceeded to quantify those rights. The Ninth Circuit affirmed the dismissal of the United States' claim, but held that the trial court lacked jurisdiction to quantify defendants' rights because parties indispensible to the action were not before the court. 94 F.2d 783, 786 (9th Cir. 1938). Included among the indispensible parties not before the court were Indian allottees living above the project. The Supreme Court affirmed. Neither the Ninth Circuit nor the Supreme Court determined what rights, if any, the parties had to the water in question. *Id.* at 786; 305 U.S. at 533, 59 S.Ct. 344. In response to the

Government argument that allottees have no rights to the reserved water, the Supreme Court stated in dictum "that when allotments of land were duly made for exclusive use and thereafter conveyed in fee, the right to use some portion of tribal waters essential for cultivation passed to the owners." 305 U.S. at 532, 59 S.Ct. at 346. The nature of this right, however, was left undefined.

This Court declines to rely on any of these cases in resolving the issue of alienability.The Court finds more instructive an analysis of first, the rationale for development of the reserved rights doctrine, and second, recent Supreme Court opinions concerning the concept of reserved rights generally.

[9] An analysis of the rationale for the reserved rights doctrine convinces this Court that the implied reservation of waters on Indian reservations should be limited to Indian ownership. *Winters* doctrine rights were reserved to members of the Indian tribe living on the reservation. *Winters, supra,* 207 U.S. at 576, 28 S.Ct. 207; *Arizona* v. *California,* 373 U.S. at 600, 83 S.Ct. 1468. Water was impliedly reserved to ensure that the lands intended to be permanent homelands for the Indians would have the necessary water to fulfill that purpose. *Id.* The Indians of the Northwest were not agrarian at the time they were forced onto reservations. The transition from the traditional nomadic life to an agrarian existence required the development of agricultural skills. Implied reserved water rights are open-ended so that as the Indians develop the necessary skills they are able to appropriate the water required to make the land productive. *See Winters, supra.* When title to Indian lands passes into non-Indian hands, the purposes for which the reserved water rights are implied no longer exist. It therefore seems logical to conclude that reserved water rights on Indian reservations are limited to Indians.

[10-12] The conclusion that water rights reserved for Indian reservations must be limited to tribal members is supported by recent Supreme Court opinions which have articulated a more restricted view of the concept of reserved

rights in general. In *Cappaert* v. *United States, supra,* the Court held that when the Government establishes a federal reservation it reserves "only that amount of water necessary to fulfill the purpose of the reservation, no more." 426 U.S. 128, 141, 96 S.Ct. at 2071 (1976). This limitation was reemphasized in *United States* v. *New Mexico,* _____ U.S. _____, 98 S.Ct. 3012, 57 L.Ed.2d 1052 (1978). The purpose of the reservation is to be determined from the intent of the creators at the time of the withdrawal from the public domain. *Id.* The reservation of water may be implied only where such water is essential to preserve the purpose for which the reservation was created. No reservation of water may be implied for any use which is not based on one of the purposes for which that land was reserved. *Id.* at _____ _____, 98 S.Ct. 3012. Applying these recent restricted concepts of reserved rights, it is clear that when the reserved purposes are terminated, as when a national park is returned to the public domain or when Indian property is sold to non-Indians, the reserved rights can no longer be judicially implied.

[13] This Court therefore concludes that *Winters* reserved rights do not per se apply to allotments owned by non-Indians. This conclusion, however, does not foreclose possible availability of water to the non-Indian grantee.

The General Allotment Act in permitting sale of allotments to non-Indians necessarily implies that some water rights may be sold with the land; otherwise the right to sell the land would be relatively worthless. The Act was designed to put Indians on an equal footing with the white man by allowing individual Indians to own fee title to land. *See* Comments of Carl Schurz, Secretary of Interior, Report of Nov. 1, 1880, in 1 House Exec. 5-6, quoted in F. PRUCHA, AMERICANIZING THE AMERICAN INDIANS, 83-86 (1973). In providing fee ownership, Congress certainly intended that the Indian could sell his land like any other owner. Providing for alienability of implied reserved water rights is not necessary to accomplish this purpose. The General Allotment Act purpose requires only that the allottee be permitted to convey a water

right with his fee to the same extent as a non-Indian homesteader.

[14] Non-Indians homesteaded much of the original Colville Reservation. Under the Desert Land Act, 19 Stat. 377 (1877), which severed water rights from lands in the public domain, *see California-Oregon Power Co.* v. *Beaver Portland Cement Co.*, 295 U.S. 142, 160-63, 55 S.Ct. 725, 79 L.Ed. 1356 (1935), homesteaders of public lands were required to perfect water rights under state law and could convey only those water rights which they had so perfected. By an 1892 Act, Congress withdrew from trust status the northern half of the Colville Reservation, restoring that portion to the public domain and opening it to settlement. The Desert Land Act with its effect on water rights definitely applies to these northern lands. The southern half of the reservation was preserved, *Seymour* v. *Superintendent*, 368 U.S. 351, 82 S.Ct. 424, 7 L.Ed.2d 346 (1962), but the 1906 Congress, 34 Stat. 80, opened surplus unallotted lands within the "diminished" Colville Reservation to settlement under the homestead laws pursuant to the General Allotment Act. While it is not clear whether the surplus lands within the reservation became part of the public domain when they were opened for settlement, *Seymour, supra,* 368 U.S. at 355-56, 82 S.Ct. 424, and thus whether the Desert Land Act applied to those lands, strong policy arguments militate against implying reserved water rights for homesteaded surplus lands. To allow homesteaders to share in the reservation's reserved water rights would greatly diminish a valuable Indian asset. The General Allotment Act and the 1906 Act cannot be interpreted as giving non-Indian settlers a share of the Indians' reserved water rights, for such a Congressional intent is not clear, and the general rule of interpreting acts affecting Indians requires that "[d]oubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith." *McClanahan* v. *Arizona State Tax Comm'n,* 411 U.S. 164, 174, 93 S.Ct. 1257, 1263, 36 L.Ed.2d 129 (1973). quoting *Carpenter* v.

Shaw, 280 U.S. 363, 367, 50 S.Ct. 121, 74 L.Ed. 478 (1930). *See also DeCoteau* v. *District County Court*, 420 U.S. 425, 444, 95 S.Ct. 1082, 43 L.Ed.2d 300 (1975). Thus, it would appear that settlers of surplus lands within the reservation may claim and transfer only rights to unreserved water.

In keeping with the purpose of the General Allotment Act, the allottee, like the non-Indian homesteader, must be permitted to convey with his land the water right which he was using at the time of the conveyance, with a priority date of the first appropriation of those waters. The priority date must be the date of actual appropriation rather than that of the founding of the reservation, for no part of the Indian allottee's implied water rights may be conveyed to a non-Indian. The value of allotments with these "in use" water rights, without *Winters* rights, is therefore comparable to homesteaded lands.

[15] However, the *Winters* rights which were formerly associated with the allotment when held by a member of the tribe do not escheat to the tribe when the allotment is sold to a non-Indian. Since the purpose of the implied reservation is defeated by the sale to a non-Indian, the right is lost completely, and the number of irrigable acres in non-Indian hands may not be used to calculate the quantity of waters reserved for the lands remaining in Indian hands. By thus reducing the quantity of reserved waters within the reservation, more water is available for appropriation by non-Indian landowners.

[16] Accordingly, the Court finds that Waltons succeeded to the water right to irrigate the 32 acres under irrigation at the time of acquisition, with a priority date of actual appropriation of water for that use.

Quantification Of Water Rights

Water within the No Name Creek Basin is limited. Estimates as to available water in the Basin range from 550 acre feet per year as testified by the Tribe's expert witness to 1300 acre feet per year as testified by defendants' expert. A witness employed by the United States Geological Survey

estimated that 1100 acre feet per year should be available for consumptive uses.

The four allotments remaining in Tribal ownership (or trust status) in the Basin contain a total of 228 irrigable acres, 157 of which are presently being irrigated. The northernmost of the four Indian-held allotments (allotment 526) is within No Name Creek water basin, but has no surface contact with the creek. In fact, another waterway, Omak Creek, traverses this allotment. There is evidence that allotment 526 was formerly irrigated with the plentiful surface waters of Omak Creek. Therefore, for purposes of quantification of water rights within the No Name Creek Drainage Basin, the acreage of the northernmost allotment will be excluded. The remaining three Indian-held allotments in the Basin contain 166.6 irrigable acres, 107.2 of which are presently under irrigation.

Estimates of the water duty, being that amount of water required per acre to grow crops, range from 4.8 acre feet to 3.6 acre feet. A witness from the United States Soil Conservation Service testified that most farmers in the Okanogan Valley near the No Name Creek Basin require 3.1 to 3.6 acre feet. Using 4.0 acre feet as the duty, the Tribe should have a total of 666.4 acre feet of water from the Basin per year reserved for their irrigable acreage within the Basin; and the Tribe would need 428.8 acre feet per year to irrigate the 107.2 acres presently under irrigation.

In addition to water for irrigation, the Tribe asks this Court to imply a reservation of water to support the Lahontan cutthroat trout spawning grounds. While the Tribe acknowledges that this species is non-indigenous, it claims that fish continue to be a traditional source of food for the members of the Tribe. Much of the natural source of fish for the reservation, the salmon and cutthroat trout runs on the Columbia River, was eliminated by construction of power and reclamation dams by the government. The Tribe asserts that fish was a natural food source for the Indians and that by establishing the reservation on the shores of the Columbia, President Grant intended to assure that fish would remain an

available food source. Since the government-built dams have depleted that source of food, the Tribe claims it was imperative to introduce non-indigenous fish to replace the lost sources and to preserve one of the purposes of the reservation.

[17,18] Under the *Winters* doctrine, this Court must look to the purposes for which the reservation was created to determine the uses for which the reservation of water may be implied, and thus to determine whether the Tribe is entitled to water for the trout. *Cappaert, supra.* The Colville Reservation was set aside as a homeland for the Indians; therefore the reservation of water sufficient to raise crops and provide food must be implied. Fish was a traditional food source of Washington Indians. *Winans, supra.* Since the natural supplies of fish have been reduced by events beyond the Tribe's control, it is logical that they should seek other means to insure the availability of that food source. Under the *Winters* doctrine, a reservation of water may be implied only to the extent necessary to fulfill the purpose of the reservation. *Cappaert, supra.* Since the Lahontan trout are presently being propagated successfully in a federal hatchery in Winthrop and made available to the Tribe, the maintenance of spawning grounds in No Name Creek is not essential to insure the supply of that fish to the reservation Indians. The purpose for which the reservation was created would not be defeated if this Court does not imply a reservation for the spawning grounds so long as the hatchery spawn is available to the Tribe. Therefore, a reservation of water for such use will not be implied at this time. *New Mexico, supra.*

[19] This Court finds that 1000 acre feet per year of water are available in No Name Creek Basin in an average year and that a total of 666.4 acre feet of water are reserved to the members of the Tribe for potential irrigation of the Indian-held allotments. Defendants Walton may divert water in excess of the reserved waters being used by the Tribe in any given year, with a priority date of actual appropriation. Since only 428.8 acre feet per year of the reserved amount is

presently being used, 571.2 acre feet per year are available for appropriation. At such time as the Tribe requires its full reserved amount, less water will, of course, be available for appropriation. Should the amount of available water be less in any year than is required to fulfill the needs of the parties, the reserved rights of the Tribe, having a priority date as of the creation of the reservation, must be first fulfilled before Waltons' appropriative rights may be exercised.

Effect Of State Water Permits Within The Reservation

The Tribe and the United States contend that the State of Washington has no authority to issue permits for appropriation of water within the reservation for use on lands within the reservation, and that permits issued to Waltons are null and void. The Tribe and the United States differ in opinion, however, concerning who ultimately holds such authority. The United States claims exclusive federal jurisdiction to regulate reservation waters. The Tribe claims that the power vested in the Secretary of Interior under 25 U.S.C. §381 is not exclusive and that the Tribe itself has inherent power to regulate its own waters.

[20-22] Although Congress has plenary power over Indian reservations, *see McClanahan, supra,* 411 U.S. at 172, n. 7, 93 S.Ct. at 1262, not all state jurisdiction over reservation lands has been barred. *See, e.g., New York ex rel. Ray* v. *Martin,* 326 U.S. 496, 66 S.Ct. 307, 90 L.Ed. 261 (1946); *DeCoteau, supra,* 420 U.S. at 427, n. 2, 95 S.Ct. 1082. Under the test set out in *Williams* v. *Lee,* 358 U.S. 217, 220, 79 S.Ct. 269, 3 L.Ed.2d 251 (1959), a state may exercise jurisdiction within the exterior boundaries of an Indian reservation where Congressional legislation has not preempted this power and where to do so would not interfere with the tribe's right to self-government. Land within the exterior boundaries of the reservation held in fee by a non-Indian, such as the Walton land, is still considered part of the reservation. *Seymour* v. *Superintendent,* 368 U.S. 351, 82 S.Ct. 424, 7

L.Ed.2d 346 (1962). As to such non-Indian lands within the reservation

> [b]oth the tribe and the State could fairly claim an interest in asserting their respective jurisdictions. The *Williams* test was designed to resolve this conflict by providing that the State could protect its interest up to the point where tribal self-government would be affected.

McClanahan, supra, 411 U.S. at 179, 93 S.Ct. at 1266.

In applying the *Williams* v. *Lee* test the Court finds no definitive action of Congress preempting state jurisdiction, although legislation set out some limitations to its exercise. The General Allotment Act provided that the Secretary of Interior could act to assure just and equal distribution of water among the Indians residing on the reservations where water was necessary for irrigation. 25 U.S.C. §381. The Act did not speak to division of water among non-Indian successors to allottees' interests. It did provide, however, that upon issuance of a fee patent, the allotment was to become subject to all civil and criminal laws of the state in which it was located. 25 U.S.C. §349. Another Congressional Act, Public Law 83-280, requires certain states, and permits other states, to assume civil and criminal jurisdiction over Indian reservations. This Act, however, does not govern jurisdiction over regulation of excess reservation waters. The Act states:

> Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States: or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute, or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

25 U.S.C. §1322(b)

[23] A state attempt to interfere with the distribution of the Indians' reserved waters would conflict with the above mentioned federal statutes. However, where the State issues a water permit for irrigation of fee land owned by a non-Indian, and the permit is subject to existing rights, including all Indian reserved rights, the State action is not contrary to any jurisdiction preempted by the Federal Government. Such a permit does not alienate, encumber, or tax the Indian property interests as prohibited by 25 U.S.C. §1322(b).

The other prong of the *Williams* v. *Lee* test requires this Court to determine whether state action in issuing water permits infringes on the Tribe's right to self-government. The Court concludes that the state action does not so infringe.

In 1948-50 when the State initially issued the Walton permit, the State did not infringe on the Tribe's right to self-government because neither the Tribe nor the Secretary of Interior were exercising any authority over No Name Creek waters. The Tribe at that time was not using any No Name Creek waters to irrigate Indian lands. The Secretary of Interior had not issued regulations to distribute waters in the Valley, and the Tribe had not exercised any inherent authority to regulate water use.

[24] More recently the Tribe enacted a Tribal Water Code which the Tribe asserts constitutes a preemption of jurisdiction preventing the state from continuing to exercise regulatory jurisdiction over water on non-Indian lands. *See Fisher* v. *District Court,* 424 U.S. 382, 96 S.Ct.943, 47 L.Ed.2d 106 (1976). If the Tribe has the power to regulate all water on the reservation, then after the enactment of the Tribal Code, state regulation of waters within the reservation indeed would amount to infringement. *Confederated Tribe of Colville Indian Res.* v. *State of Wash.,* 412 F.Supp. 651 (E.D. Wash. 1976).

[25] Indian tribes do possess "a certain degree of independent authority over matters that affect the internal and social relations of tribal life." *United States* v. *Mazurie,* 419

U.S. 544, 557, 95 S.Ct. 710, 718, 42 L.Ed.2d 706 (1975). Distribution of reservation waters among tribal members qualifies as a matter affecting the internal relations of tribal life, and thus the Tribe must enjoy independent authority to regulate tribal waters, with the Secretary of Interior pursuant to 25 U.S.C. §381 having concurrent jurisdiction to assure that the water is divided in a just and equal manner among the Indians on the reservation.

[26, 27] Whether the Tribe's independent authority extends to regulation of non-reserved water to be used on fee lands owned by non-Indians within the reservation is a more difficult issue. The United States has long recognized and upheld title to water rights perfected under local law. *See Jennison* v. *Kirk,* 98 U.S. 453, 25 L.Ed. 240 (1879); Act of July 26, 1866, ch. 262, 14 Stat. 251, amended in Act of July 9, 1870, ch. 235, 16 Stat. 217. In 1877 Congress enacted the Desert Land Act, ch. 107, 19 Stat. 377, which permitted water from public lands to be appropriated under state and local law. *See California-Oregon Power Co.* v. *Beaver Portland Cement Co.,* 295 U.S. 142, 160-63, 55 S.Ct. 725, 79 L.Ed. 1356 (1935). This Act did not relinquish the authority of Congress to reserve unappropriated water for use on lands withdrawn from the public domain. *Arizona* v. *California,* 373 U.S. at 597-98, 83 S.Ct. 1468. Where water on a federal reservation was not explicitly reserved and is required for a secondary use, however, the Supreme Court has inferred that "Congress intended . . . that the United States would acquire water in the same manner as any other public or private appropriator." *New Mexico, supra,* _____ U.S. at _____, 98 S.Ct. at 3015. Thus, where water is not explicitly or impliedly reserved, it must be appropriated under state water laws even when needed by the Federal sovereign for a federal reserve. *Id.*

If the Federal sovereign does not control unappropriated reservation waters claimed for non-reserved uses, and must claim water for such uses under state law, it follows that Indian tribes must be similarly limited. Because the tribal

jurisdiction over water is thus restricted to the regulation of reserved water, state jurisdiction over excess waters will not infringe on the Indians' right to self-government.

[28] This Court accordingly finds that the State's issuance of permits for appropriation of excess waters on the reservation does not invade power preempted by federal legislation and does not infringe on the Tribe's right to self-government. The Court therefore holds that the State of Washington has jurisdiction over the non-reserved waters within the Colville Reservation and that the Colville Tribal Water Code must be limited to regulation of reserved waters.

This Memorandum Opinion shall constitute the Court's findings and conclusions.

An appropriate order will be entered herein in conformance with this opinion. Each party shall, within twenty days, submit and serve a proposed form of order for the Court's consideration.

Appendix

The parties have stipulated to the following facts:

1. Plaintiff tribe is an Indian tribe recognized as such by the Secretary of the Interior.

2. Plaintiff United States is the legal owner of the trust lands within the exterior boundaries of the Colville Indian Reservation for the benefit of the tribe.

3. Defendants Boyd Walton, Jr., and Kenna Jeanne Walton, his wife, and Wilson Walton and Margaret Walton, his wife, are owners in fee of approximately 350 acres of land located within the exterior boundaries of the Colville Indian Reservation. Waltons are mesne grantees of these lands for which the United States had issued fee simple patents. The Walton defendants are not Indians.

4. Defendant State of Washington, through its Department of Ecology, is the state entity having the authority and obligation to administer and enforce the ground and surface

water codes (R.C.W. 90.03 and 90.44) of the State of Washington.

5. The lands presently within the boundaries of Colville Indian Reservation were included within the lands ceded to the United States of America by Treaty with Great Britain on June 15, 1846.

6. The original Colville Reservation was created from the public domain by Executive Order of President Grant on July 2, 1872.

7. The State of Washington was admitted to the United States on November 11, 1889, and the Colville Reservation is within the boundaries of said state.

8. The north half of the original Colville Reservation was restored to the public domain by Act of July 1, 1892 (27 Stat. 62).

9. The south half, or "diminished" Colville Reservation, as presently existing, is located in Okanogan and Ferry Counties, Washington.

10. An Act of March 22, 1906 (34 Stat. 80) provided for the sale and disposition of unallotted lands on the diminished reservation. Pursuant to that Act, President Wilson, by Proclamation of May 3, 1916 (39 Stat. 1778), declared the nonmineral unallotted and unreserved lands within the diminished Colville Reservation open to entry and settlement under the provisions of the homestead laws.

11. By order of September 19, 1934, Secretary of the Interior Ickes withdrew all undisposed-of or surplus land of the diminished Colville Reservation from all forms of entry or disposal under the public land laws of the United States.

12. In an election on April 6, 1935, a majority of the Colville Indians voted to exclude themselves from the operation of the Indian Reorganization Act of 1934. (25 U.S.C. §461 et seq.). However, the order of the Secretary of September 19, 1934 withdrawing lands from entry was not revoked.

13. By Act of July 24, 1956 (70 Stat. 626), Congress, among other things, restored the undisposed-of lands within the diminished Colville Reservation to the beneficial ownership of the tribe.

14. No Name Creek is a small, non-navigable stream the surface flow of which arises from springs located on and immediately adjacent to the northerly portion of the fee lands owned by defendants Walton and flows in a southerly direction across Waltons' lands, allotted Indian land and tribal lands where it enters Omak Lake.

15. The lands adjacent to the northerly boundary of Waltons' land are designated as Trust Allotment No. 892 (the Peters allotment). The United States is legal owner, as trustee, of said Trust Allotment.

16. After traversing the Waltons' land, No Name Creek enters upon and traverses lands designated as Trust Allotment No. 901 (the Mary Ann or Yatkanolx allotment), where the water course crosses a granite lip. The United States of America is the legal owner, as trustee, of said Trust Allotment.

17. After traversing Trust Allotment No. 901, No Name Creek enters Trust Allotment 903 (the Edwards allotment). The United States of America is the legal owner, as trustee, of said Trust Allotment.

18. In a state of nature, No Name Creek entered Omak Lake within Trust Allotment 903. However, at the present time, the creek flows into Omak Lake by an artificial channel across lands adjacent to Trust Allotment 903, which lands are held by the United States of America as trustee for the Colville Tribes as tribal lands.

19. Omache Lake Resort, operated by the Colville Confederated Tribes, is located on the tribal lands adjacent to Trust Allotment No. 903 and abutting Omak Lake.

20. Waltons' lands have been developed by the Waltons as a homesite and for the operation of a dairy farm. 102 acres thereof are now under irrigation.

21. Waltons use the subject water for domestic, stock water and irrigation purposes. This water is obtained from wells on their land and by diversion from No Name Creek.

22. The 350 acres of land now owned by the Waltons are former trust allotments Nos. 525, 2371, and 894. These former trust allotments were transferred from trust to non-trust status by patents issued by the United States of America as follows:

(a) Allotment No. 525 was allotted to Alexander Smitaken by trust patent. On August 10, 1925, a fee simple patent was issued by the United States to Hattie Justus Wham, removing the property from trust status.

(b) Allotment No. 2371 was issued to George Alexander Smitaken by trust patent dated April 7, 1917. On January 28, 1921, a fee simple patent was issued by the United States to Paul Smitaken, removing the property from trust status.

(c) Allotment No. 894 was allotted to William George by trust patent dated April 7, 1917. On May 5, 1923, a fee simple patent was issued by the United States to Hattie Justus Wham, removing the property from trust status.

23. Waltons acquired title to these 350 acres by deed dated July 16, 1948.

24. On August 24, 1948, defendant Wilson Walton filed an application with the Washington State Department of Hydraulics, predecessor agency of the State Department of Ecology, for a permit to divert water from No Name Creek for the purpose of irrigation. On November 28, 1949, the Supervisor of Hydraulics issued a permit to Wilson Walton to divert 1.0 cubic feet per second of water from No Name Creek to irrigate 75 acres of land.

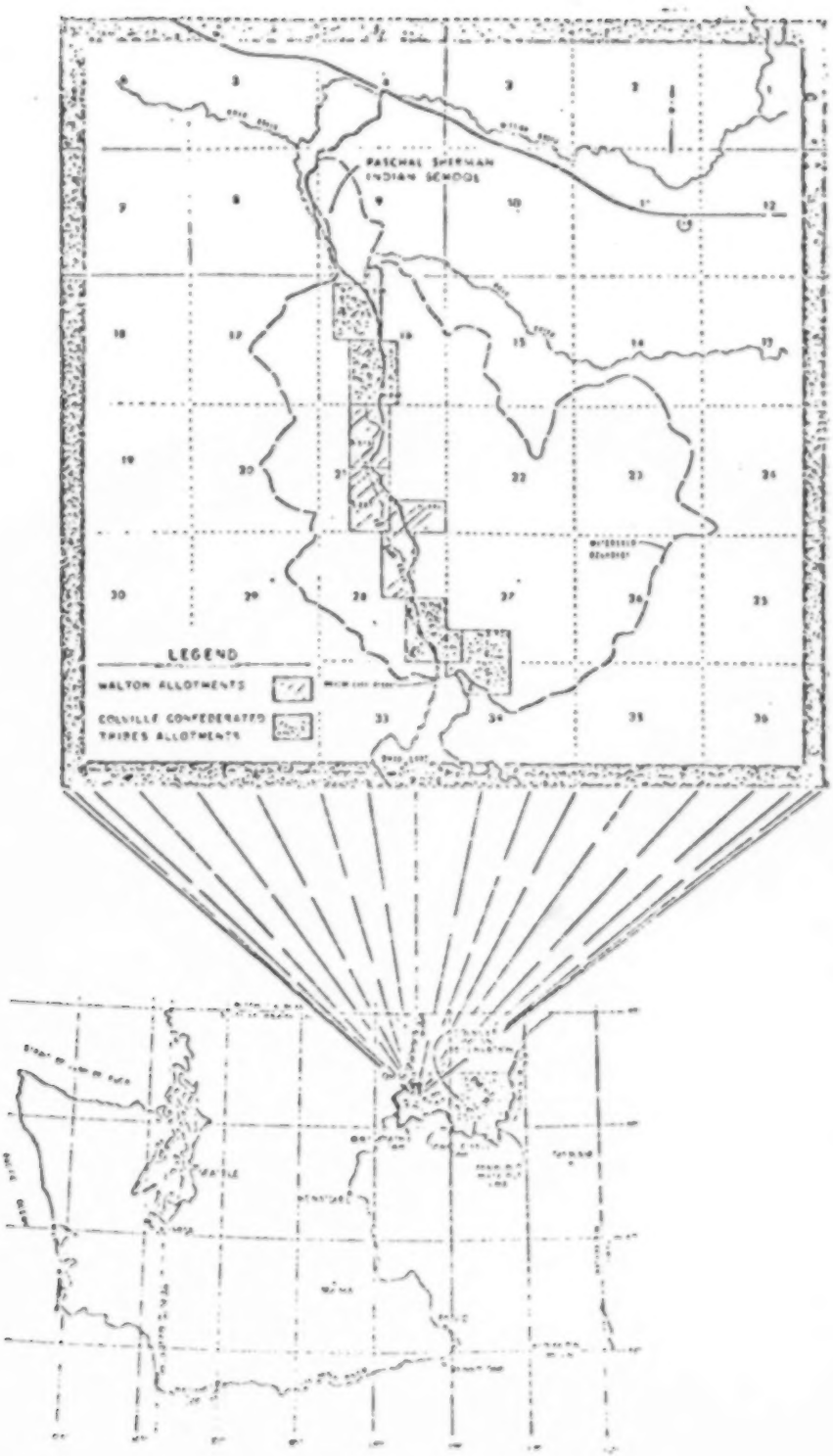
25. On August 25, 1950, pursuant to Walton's application the state Supervisor of Hydraulics issued a Certificate of

Water Right to defendant Wilson Walton for the diversion of 1.0 cubic feet per second of water from No Name Creek for the irrigation of 65 acres of land.

26. At the time the state Supervisor of Hydraulics issued the foregoing certificate, there was no diversion of water from No Name Creek basin other than by defendant Walton.

27. Subsequent to the commencement of action No. 3421 by the Colville Confederated Tribes, the tribe started a program for the development of underground waters on tribal and trust lands lying north of Waltons' lands.

[See following illustration.] (See, Appendix I to this Petition)



MAP OF THE NO NAME CREEK BASIN

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

No. C-3421
COLVILLE CONFEDERATED TRIBES, *Plaintiff,*

v.

BOYD WALTON, JR., et ux, et al., *Defendants.*
STATE OF WASHINGTON, *Defendant-Intervenor,*

No. C-3831

UNITED STATES OF AMERICA, *Plaintiff,*

v.

WILLIAM BOYD WALTON, et ux, et al., and
THE STATE OF WASHINGTON, *Defendants.*

JUDGMENT

(Filed February 9, 1979)

The Court having heretofore entered its Memorandum Opinion containing its findings and conclusions, now therefore, in accordance therewith, it is

ORDERED and DECREED

I.

At the present time, the United States of America is the legal owner of a water right with a priority date of 1872 to the surface and ground waters of No Name Creek Basin for the benefit of the Indian allottees of Allotments 901, 903 and

892, and for the benefit of the Tribe for 9.5 acres of unallotted Tribal Trust Lands west of Colville Allotment No. 901 and .8 acres of Tribal Trust Lands west of Colville Allotment No. 892. The water duty for irrigation of the irrigable acres on the allotments and Tribal Trust Lands is 4.0 acre-feet per acre. The total reserve waters for irrigation of the above lands is as follows:

Allotment	Diversion Duty Per Acre	Irrigable Acreage	Total In Acre-Feet
901	4.0	41.1	164.4
903	4.0	57.3	229.2
892	4.0	57.9	231.6
Tribal Lands	4.0	10.3	41.2
Total	4.0	166.6	666.4

II.

While Allotment No. 526 also lies within the No Name Creek Drainage Basin, it has a potential alternate source for irrigation water, Omak Creek, which traverses the allotment. Until the availability, sufficiency and economy of using Omak Creek water for irrigation of Allotment No. 526 can be considered by this Court, no final adjudication of the source of water reserved for irrigation of Allotment No. 526 will be made. The duty for Allotment No. 526 is as follows:

Allotment	Diversion Duty Per Acre	Irrigable Acreage	Total In Acre-Feet
526	4.0	61.8	247.2

A total of 247.2 acre-feet of water must be available annually to irrigate Allotment No. 526. This Court does not determine at this time whether such water must come from Omak Creek, No Name Creek Basin or both.

III.

At the present time, use of the ground and surface waters of No Name Creek Basin is not necessary to maintain a Lahontan trout fishery in Omak Lake, and a reserved right to the waters of No Name Creek Basin for such purpose will be neither quantified nor implied at this time, although the United States of America or the Tribe may later assert a reserved water right for such use if and when such use is needed to fulfill the purposes of the Reservation.

IV.

The United States and the Colville Confederated Tribe have concurrent jurisdiction over those rights to use waters of No Name Creek impliedly reserved by the United States.

The Colville Tribal Water Code's application is limited to regulation of reserved waters, and the Secretary of Interior, pursuant to 25 U.S.C. §381, may act to assure that there is a just and equal distribution of the reserved waters among the Indians entitled to their use.

V.

The State of Washington has jurisdiction over the non-reserved waters within the Colville Indian Reservation.

The State of Washington has authority to apply its water right laws and to establish water rights pursuant thereto, with respect to waters which are presently in excess of those required to satisfy any reserved water rights held by the United States for the Tribe and its members.

VI.

Upon purchase of their lands within the No Name Creek Basin, the defendants Walton did not acquire a right to share in the waters reserved by the United States of America for the benefit of the Colville Confederated Tribes and its members. They did succeed to a right to the use of waters of No Name Creek Basin to irrigate 32 acres of land with a priority date of actual appropriation of water for that use, PROVIDED,

HOWEVER, that such water right is subject to prior reserved right to the use of such waters held by the United States for the benefit of the Colville Confederated Tribes and its members.

VII.

In order to perfect the above rights and to acquire further rights to the use of ground and surface waters of No Name Creek Basin the defendants Walton must proceed in accordance with the laws of the State of Washington, PROVIDED, HOWEVER, any rights to the use of water acquired by the defendants Walton shall be subject to the prior reserved right to the use of water held by the United States for the benefit of the Tribe and its members.

VIII.

The State of Washington has the right and authority to issue permits to non-Indians for the use of waters within the Colville Indian Reservation in accordance with the provisions of the law of the State of Washington, PROVIDED, HOWEVER, that any use of water authorized by the State is subject to the prior reserved right to the use of water held by the United States for the benefit of the Tribe and its members.

IX.

One thousand acre-feet of water should be available in the Basin in an average year. Should the amount of water available in No Name Creek Basin be less in any year than is required to fulfill the needs of the parties, the reserved rights to the use of water held by the United States for the benefit of the Colville Confederated Tribes and its members, having a priority date as of the creation of the Reservation, must be first fulfilled before the appropriative rights of the defendants Walton may be exercised.

X.

The issuance by the State of Washington of the permit and certificate for the use of waters within No Name Creek to

defendants Walton was a valid exercise of authority by the State as to water in excess of waters reserved by the United States for the benefit of the Tribe and its members.

XI.

The requests of plaintiffs for orders declaring all permits and certificates issued by the State of Washington for the use of water within the Colville Indian Reservation to be null and void and that the state be enjoined from issuing further permits or certificates for the use of water within the Colville Indian Reservation are DENIED.

XII.

All parties are permanently enjoined from attempting physically to interfere with the others' beneficial use of water as authorized by this Order.

XIII.

All parties utilizing water for any purpose whatsoever in the No Name Creek Basin, excluding domestic uses, shall monitor and measure the amount of water put to beneficial use with accurate and approved recording data approved by the United States Geological Survey. The United States Geological Survey shall have the right to enter upon lands of any of the parties at any reasonable time for the purpose of maintaining accurate records for the reasonable implementation of this Order.

XIV.

The damage claims asserted by defendants Walton against the United States of America and the State of Washington are dismissed.

XV.

Each party shall bear its own costs.

DONE BY THE COURT this 9th day of February, 1979.

/s/ MARSHALL A. NEILL
Marshall A. Neill
United States District Judge

APPENDIX F

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

No. C-3421

COLVILLE CONFEDERATED TRIBES, *Plaintiff,*

v.

BOYD WALTON, JR., et ux, et al., *Defendants.*

STATE OF WASHINGTON, *Defendant-Intervenor,*

No. C-3831

UNITED STATES OF AMERICA, *Plaintiff,*

v.

WILLIAM BOYD WALTON, et ux, et al., and
THE STATE OF WASHINGTON, *Defendants.*

MEMORANDUM OPINION

(Filed February 9, 1979)

Sub judice is plaintiff Tribe's Motion to Amend the Findings of Fact in the Court's October 25, 1978 Memorandum Opinion. The Tribe objects to the Court's finding that the northernmost allotment (S-526) was historically irrigated by waters from Omak Creek; objects to the omission of the irrigable acres of that allotment from the calculations of water reserved from the No Name Creek Basin; and asks for reconsideration of the quantification of water and of the average water duty.

This Court is convinced that there was sufficient evidence in the record on which to base all of its findings. Whether irrigation of allotment S-526 from Omak Creek actually occur-

red is irrelevant, however, to this Court's decision that S-526 irrigation water not be adjudicated as being reserved from No Name Creek Basin at this time. While S-526 lies within the No Name Creek Basin, surface waters of Omak Creek also traverse the allotment. Where irrigable acreage having the right to *Winters* reserved waters lies so obviously within two water systems, for a court to grant reserved water rights for that acreage from one water system without consideration of the availability of water from the other system would be unjust.

A present denial of the request to include allotment S-526 in the quantification of the reserved waters in No Name Creek Basin does not preclude this Court from considering a future petition to recalculate the quantity of reserved water in the Basin. Just as the United States or the Tribe may later show the need for reserved water to maintain the Lahotan trout should the hatchery fish become unavailable, the Tribe may later show that Omak waters are insufficient, unavailable, or uneconomical to satisfy all of the reserved water needs of allotment S-526.

The Tribe, having reserved rights to Omak Creek water as well as that of No Name Creek, should have priority over non-reserved users. Therefore, until such time as rights to Omak Creek waters are also adjudicated, this Court cannot determine from which source irrigation water for allotment S-526 must come. The fact that the Tribe is presently using No Name water to irrigate S-526 is not relevant to this Court's decision. The Tribe installed its present irrigation system pumping No Name Creek Basin groundwater from allotment H-892 north to S-526 pursuant to testing orders issued by this Court. The system was installed at the Tribe's own risk with full knowledge that it would not be a determinative factor in this present litigation. Therefore, plaintiff's motion to amend is DENIED.

All remaining pending motions are DENIED.

IT IS SO ORDERED.

DONE BY THE COURT this 9th day of February, 1979.

/s/ MARSHALL NEILL
Marshall Neill
United States District Judge

Entered in Civil Docket on
2/9/79

APPENDIX G

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Civil No. 3421

COLVILLE CONFEDERATED TRIBES, *Plaintiff,*

v.

BOYD WALTON, JR., et ux., et al., *Defendants,*

STATE OF WASHINGTON, *Defendant-Intervenor.*

Civil No. 3831

UNITED STATES OF AMERICA, *Plaintiff,*

v.

WILLIAM BOYD WALTON, et ux., et al., and
the STATE OF WASHINGTON, *Defendants.*

ORDER AMENDING PARAGRAPH XIII OF THE JUDGMENT

(Filed April 2, 1979)

Pursuant to the motion of the United States of America, IT IS HEREBY ORDERED AND DECREED that Paragraph XIII of the Judgment entered herein on February 9, 1979, be deleted and that the following language be substituted for Paragraph XIII:

> All parties utilizing water for any purpose whatsoever in the No Name Creek Basin, excluding domestic uses, shall monitor and measure the amount of water removed each year by such party from the No Name Creek Basin, said measurements to be calculated through the use of accurate recording devices approved by the United States Geological Survey (USGS). During the periods of water removal each year, each party utilizing such water shall

submit monthly reports to the USGS office in Spokane, Washington, as to the amount of water utilized based upon the measurements provided by the recording devices, and periodically the USGS shall submit reports of the recorded water use to the Court with copies to the parties to this action. The USGS shall have the right to enter upon lands of any of the parties at any reasonable time for the purpose of maintaining accurate records for the reasonable implementation of this Order. The Court shall retain continuing jurisdiction to administer and interpret the provisions of this Paragraph.

DATED this 2nd day of April, 1979.

/s/ MARSHALL A. NEILL
Marshall A. Neill
United States District Judge

Presented by:

/s/ ROBERT M. SWEENEY
Robert M. Sweeney
Assistant U. S. Attorney

P. O. Box 1494
Spokane, Wa. 99210
Tel. (509) 456-3811

APPENDIX H

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Civil No. 3421

COLVILLE CONFEDERATED TRIBES, *Plaintiff,*

v.

BOYD WALTON, JR., et ux., et al., *Defendants.*
STATE OF WASHINGTON, *Defendant-Intervenor,*

Civil No. 3831

UNITED STATES OF AMERICA, *Plaintiff,*

v.

WILLIAM BOYD WALTON, et ux., et al., and
THE STATE OF WASHINGTON, *Defendants.*

ORDER CONFIRMING PARAGRAPH XIII OF THE JUDGMENT

(Filed March 3, 1981)

Pursuant to the hearings in this matter held on November 3, 1980, and on February 2, 1981, and on the motion of the United States to confirm the provisions of Paragraph XIII of the Judgment entered February 9, 1979, as amended, is granted; and

IT IS ORDERED that United States Geological Survey personnel shall have the right at any reasonable time to enter upon the Tribal lands as well as the Walton lands to monitor and record data from the recorders, gauging stations, well

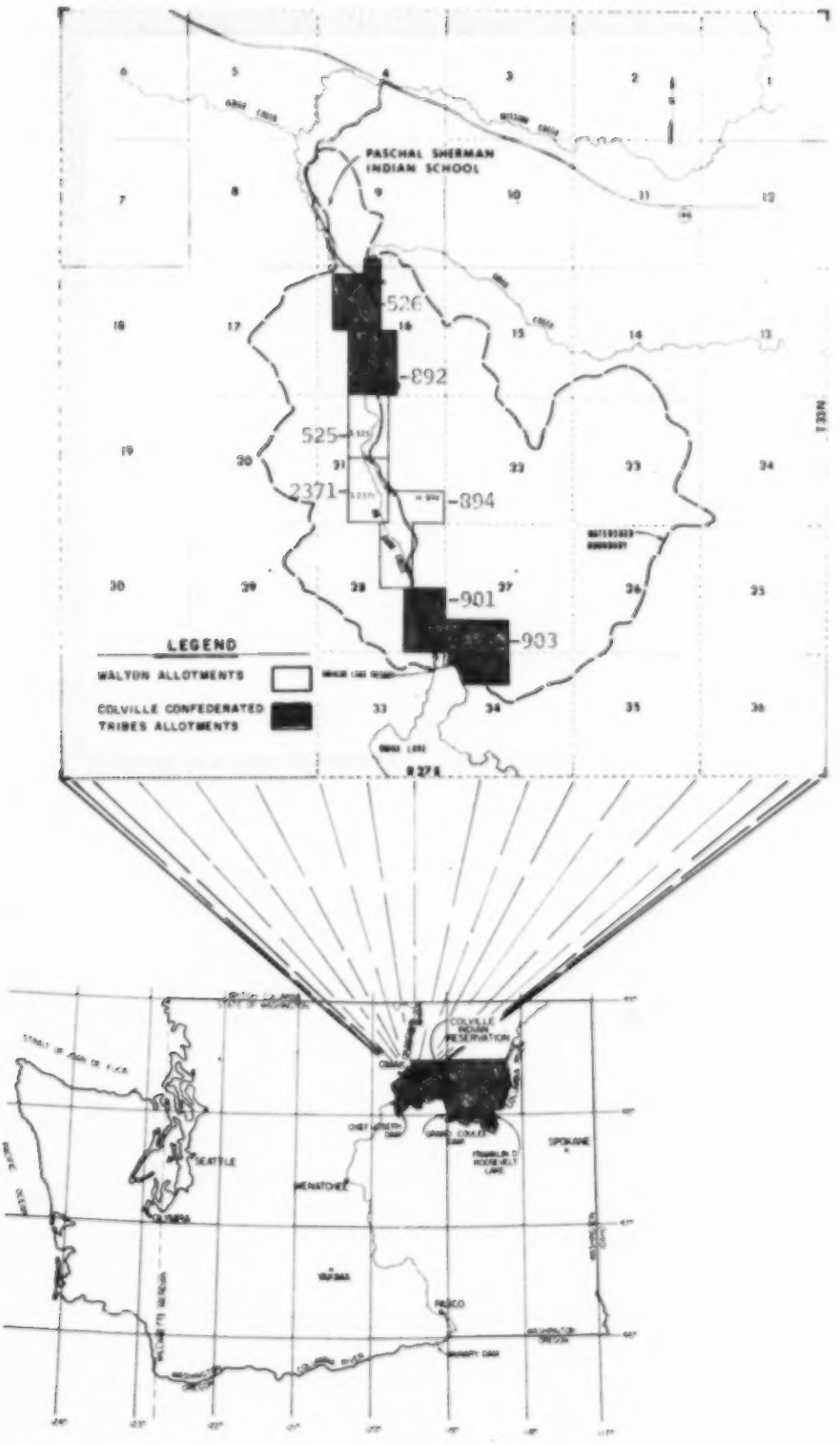
pumps and observation wells located on the lands within the No Name Creek Basin.

DATED this 3rd day of March, 1981.

/s/ ROBERT J. MCNICHOLS
Robert J. McNichols
United States District Judge

Presented by:

/s/ JUDITH A. CORBIN
Judith A. Corbin
Assistant U. S. Attorney



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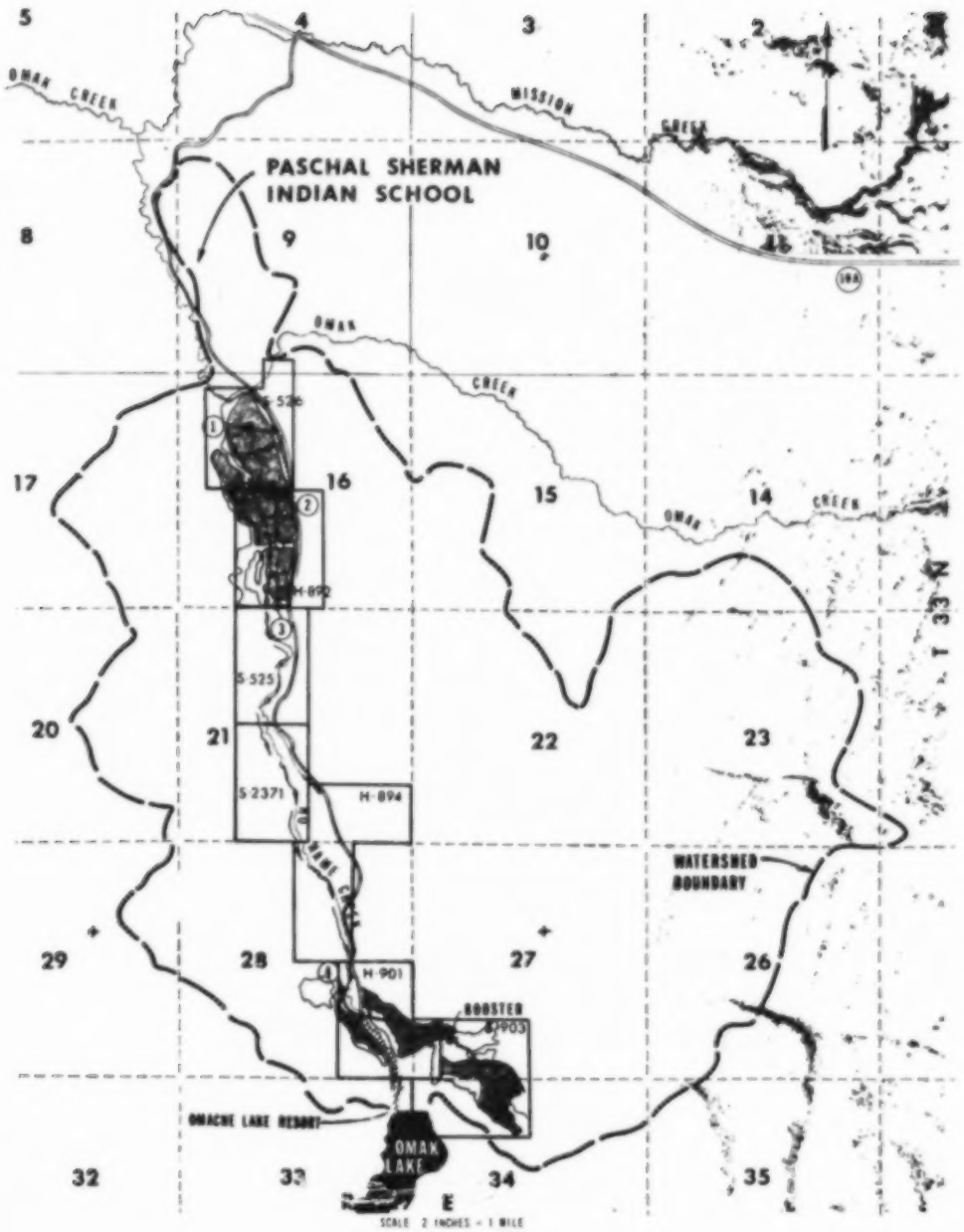


EXPLANATION

IRRIGATION WATER DEVELOPMENT, DELIVERY, AND APPLICATION SYSTEM

WELLS

- ① PASCHAL SHERMAN IRRIGATION WELL
- ② COLVILLE NUMBER 1 IRRIGATION WELL
- ③ COLVILLE NUMBER 2 IRRIGATION WELL

SURFACE DIVERSION

- ④ DIVERSION POINT FOR "SOUTH UNIT" COLVILLE IRRIGATION PROJECT

DELIVERY SYSTEM

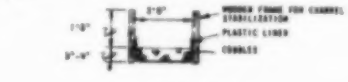
- PORTABLE ALUMINUM SPRINKLER PIPE
- BURIED STEEL PIPE
- BURIED PLASTIC PIPE
- NATURAL CHANNEL FOR CONVEYANCE

APPLICATION SYSTEM

- PORTABLE ALUMINUM HAND-MOVE SPRINKLER LINE
- AUTOMATED CENTER PIVOT SPRINKLER LINE

LAHONTON CUTTHROAT FISHERY

- REINFORCED CONCRETE AND BEARING CHANNEL



TYPICAL SECTION

IRRIGATION LAND DEVELOPMENT

- IRRIGATED ACRES (1977)
- UNDEVELOPED IRRIGABLE ACRES

IRRIGATION SUMMARY

ALLOTMENT	IRRIGATED ACRES (1977)	UNDEVELOPED IRRIGABLE ACRES	TOTALS
S-526	95.7	11.1	91.8
S-892	93.8	19.3	97.8
TRIBAL TRUST	.5	.7	1.0
S-525	80.4	10.7	91.1
TRIBAL TRUST	-----	0.0	0.0
S-903	33.4	23.9	57.3
TOTALS	107.9	70.5	339.4

COLVILLE IRRIGATION PROJECT

DECEMBER 1977
(PHOTO REDUCTION DECEMBER 1979)

PLATE NO. 2
COLVILLE EXHIBIT NO. 8
ADMITTED INTO EVIDENCE
PAGE 392 VOLUME 2

Opposition

1

No. 81-321

Office - Supreme Court, U.S.
FILED
SEP 23 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

COLVILLE CONFEDERATED TRIBES, *Petitioners,*
v.
BOYD WALTON JR., *et ux., et al.,* AND THE STATE OF WASHINGTON, *Intervenor, Respondents.*

UNITED STATES OF AMERICA, *Respondents,*
v.
WILLIAM BOYD WALTON, *et ux., et al.,* AND THE STATE OF WASHINGTON, *Respondents.*

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WILLIAM BOYD WALTON, *et ux., et al.,* AND THE STATE OF WASHINGTON, *Respondents.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENTS WILLIAM BOYD WALTON, et ux.

Of Counsel:

RICHARD B. PRICE
Post Office Box 904
435 Maple Street
Omak, Washington 98841
(509) 826-5110

FRANK J. MARTIN, JR.
JOHN D. SHARER
SUTHERLAND, ASBILL & BRENNAN
1666 K Street, N.W., Suite 800
Washington, D.C. 20006
(202) 872-7800

Attorneys for Respondents
William Boyd Walton, *et ux.*

QUESTION PRESENTED

Whether this Court should disturb an important but settled point of federal water rights law by granting review of a Ninth Circuit decision which was correctly based on this Court's holding in *United States* v. *Powers*, 305 U.S. 527 (1939), as interpreted and applied by the Ninth Circuit in *United States* v. *Ahtanum Irrigation District*, 236 F.2d 321 (9th Cir. 1956), *cert. denied*, 352 U.S. 988 (1957).

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IN THE

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENTS WILLIAM BOYD WALTON, et ux.

OPINIONS BELOW

The June 1, 1981 opinion of the Court of Appeals on rehearing is reported at 647 F.2d 42 and is reproduced in Appendix B of the Petition for a Writ of Certiorari filed on August 18, 1981, by the Colville Confederated Tribes. The same court's opinion of August 20, 1980, which was withdrawn and replaced by the above-referenced opinion on rehearing, is not reported, but is reproduced in Appendix C of said Petition. The October 25, 1978 opinion of the United States District Court for the Eastern District of Washington is reported at 460 F. Supp. 1320, and is reproduced in Appendix D of said Petition.

JURISDICTION

The judgment of the Court of Appeals was entered on June 1, 1981. The Petition of the Colville Confederated Tribes was received by the Walton respondents on August 24, 1981. Jurisdiction of this Court was invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The pertinent statute is the General Allotment Act of February 8, 1887, ch. 119 (24 Stat. 388), 25 U.S.C. § 331 *et seq.*

STATEMENT OF THE CASE

The Colville Indian Reservation was created by Executive Order in 1872, and its present exterior boundaries were established by Congress some 20 years later. Act of July 1, 1892, 27 Stat. 62. Pursuant to the Act of March 22, 1906, Pub. L. No. 59-61, ch. 1126, 34 Stat. 80, and an effectuating Presidential Proclamation of 1916, Reservation lands were allotted to individual members of the Tribes pursuant to the General Allotment Act of 1887,

and thereafter conveyed in fee "free of all charge or incumbrance whatsoever." 24 Stat. 388, 389.

The Walton respondents own in fee and farm three of seven adjoining original allotments, ranging from north to south along the No Name hydrological system on the Colville Reservation. The other four allotments — *i.e.*, the two allotments to the north of Walton's property, as well as the two to the south — are now held in trust by the United States for Indian allottees, and are presently leased to the Colville Confederated Tribes.

The No Name hydrological system consists of three elements: (1) an aquifer underlying the Indians' two northern allotments and the northern tip of the Walton property; (2) No Name Creek which arises from various springs located on the northernmost portion of the Walton property, and flows south across it and the two southerly Indian-owned allotments into Omak Lake; and (3) Omak Lake, which lies wholly within the Reservation, has no outlet, and is saline. The northernmost Indian allotment is traversed by, and can be irrigated from, another Reservation stream which is not directly connected with the No Name hydrological system.

The Indian-owned lands which are irrigable in part by use of No Name hydrological system water contain a total of 166.6 acres of practicably irrigable land, of which only 107.2 acres are now being irrigated by the Colvilles. When the Waltons acquired their land, only 32 acres were being irrigated; now the Waltons irrigate 104 acres. The annual duty of water required for irrigation in the No Name drainage area is 4 acre feet. The average annual flow of the No Name hydrological system is 1,000 acre feet.

In 1968, the Colvilles, with the help of the Department of the Interior, introduced Lahontan Cutthroat Trout

into Omak Lake. The federal government provided, and continues to provide, the Indians with fish hatchery fingerlings to maintain the stock of trout in the lake. This is necessary, as the natural tributaries to the lake are insufficient, by themselves, to support the fishery. Prior to 1970 the Indians began to cultivate No Name Creek's lower reaches in an effort to establish theretofore nonexistent spawning grounds there, but irrigation uses diminished the water flow during spawning season.

The Colvilles brought suit against the Waltons in the United States District Court for the Eastern District of Washington. The Tribes claimed exclusive "*Winters* rights" to the waters in question, citing this Court's decisions in *Winters* v. *United States,* 207 U.S. 564 (1908); *Arizona* v. *California,* 373 U.S. 546 (1963), and related cases. The State of Washington intervened on behalf of the Waltons who, in addition to their claim to have succeeded to a "*Winters* right" to irrigation water as an appurtenance to their former Indian allotments, also claimed state-law water rights to irrigate some 65 acres under a water rights certificate issued by the State of Washington.

The United States declined to intervene on behalf of the Colvilles but instead brought a separate action against the State of Washington asserting, *inter alia,* that the Secretary of the Interior has exclusive jurisdiction to administer all of the water resources of the Reservation. The United States also sought a declaration that the Waltons' state water certificates were null and void, and an order enjoining the State from issuance of further certificates within the Reservation. The two suits were consolidated for trial.

The District Court held that the Indians had a reserved *Winters* doctrine water right, with an 1872 priority, to sufficient water in the No Name hydrological system to

irrigate all their retained lands practicably irrigable only from that system, whether or not under irrigation at the present time, and that the portion of their reserved right not now used for irrigation could potentially be used to create spawning grounds for the introduced trout. However, because the United States was supplying fingerlings as a necessary adjunct to the fishery, with or without natural spawning, the District Judge declined to adjudicate any of the unused portion of the Indians' reserved right explicitly for this purpose.

The District Judge held that the Waltons did not acquire *Winters* rights with an 1872 priority with their former Indian lands, but rather that the *Winters* rights which had been appurtenant to their allotments while still in Indian ownership had simply disappeared upon purported conveyance to non-Indians. The District Judge accordingly held that at the time they acquired their lands, the Waltons received only a right to irrigate the 32 acres then under irrigation, with a priority of the date of first use, and that the Waltons now have only such other junior water rights as they have obtained subsequently: *i.e.*, the right under federal law to use Indian reserved water until put to use by the Indians; and rights to water over and above the Indian reserved water, *i.e.*, rights to so-called "excess waters," pursuant to their state water law certificate.

On appeal to the Ninth Circuit, a panel of that Court recognized that the issue of transferability of *Winters* irrigation water rights to non-Indians was the primary issue in the case; however, in its first opinion (later withdrawn) the panel accepted the District Judge's erroneous reasoning and sustained his holding that non-Indians could not acquire *Winters* rights by purchase. The panel sustained the District Court on all other significant points, as well.

Petitions for rehearing were filed, including a Petition for Rehearing and Suggestion for Rehearing En Banc filed on behalf of the Walton respondents. In their Petition, the Waltons insisted that the panel's initial opinion adopting the District Court's views was contrary to binding precedent on the central issue of transferability of *Winters* water rights. The same panel of the Ninth Circuit thereupon granted rehearing, withdrew its earlier opinion, and reversed the District Court's holding that *Winters* rights could not be conveyed to non-Indians. On rehearing, the panel read this Court's decision in *United States* v. *Powers*, 305 U.S. 527 (1939), as holding that a portion of the Indian *Winters* doctrine water right, as an appurtenance to the land, is conveyed with Indian allotments when, after the initial trust period, in accordance with the provisions of the General Allotment Act, 25 U.S.C. § 331 *et seq.*, they are conveyed to the allottees in fee simple "discharged of said trust and free of all charge or incumbrance whatsoever. . . ." The panel reasoned that to hold that the allottees could not in turn convey their vested appurtenant water rights for a valuable consideration would contravene the well-established rule that an Indian right cannot be terminated absent express Congressional intent, *citing Bryan* v. *Itasca County*, 426 U.S. 373 (1976); *Mattz* v. *Arnett*, 412 U.S. 481 (1972). The Ninth Circuit also acknowledged that its decision in *United States* v. *Ahtanum Irrigation District*, 236 F.2d 321 (9th Cir. 1956), *cert. denied*, 352 U.S. 988 (1957), had held that non-Indian purchasers of allotted lands are entitled to "participate ratably" with Indian allottees in the use of reserved water. 647 F.2d at 50.

The Ninth Circuit's substituted opinion on rehearing reversed the holding of the District Court that state certificates could validly issue as to excess waters within the Reservation, holding instead, in accordance with the

Ninth Circuit decision in *United States* v. *McIntire,* 101 F.2d 650, 654 (9th Cir. 1934), that jurisdiction over water rights within the Reservation rests exclusively with the federal government. The Court of Appeals also withdrew its simple affirmance of the District Judge's refusal to adjudicate *Winters* water rights to the Colvilles for the express purpose of creating spawning grounds for the Lahontan Cutthroat Trout. On rehearing, the Court of Appeals expressed the view that the District Court could adjudicate to the Colvilles, out of their unused *Winters* water rights measured by their retained irrigable acreage, water rights in the No Name hydrological system for use for the natural spawning of trout, even though the government is for the present supplying fingerlings.[1]

ARGUMENT

The Petitioner Colville Confederated Tribes assert that the concededly important question whether *Winters* rights may be acquired by non-Indians is unsettled. Petitioners base their contention that a writ of certiorari should issue on this proposition, and on one other —

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[1] In its Petition for a Writ of Certiorari filed on August 28, 1981, the State of Washington has sought review of the Court of Appeals' holdings respecting the lack of state water rights jurisdiction within the Reservation, and respecting the adjudication of water for the spawning of the introduced trout. It is submitted that the jurisdictional question, like the transferability question, has long been settled, and does not warrant review. *United States* v. *McIntire,* 101 F.2d 650, 654 (9th Cir. 1934). As for the State's request respecting adjudication of water for spawning, it is believed that the State misunderstands the Ninth Circuit's holding, which seems clearly restricted to permitting use for spawning of water reserved, but not at present used, for irrigation. If, however, this Court grants certiorari with respect to the issues raised by the State's Petition, it is respectfully submitted that certiorari on the transferability question should nonetheless be denied for the reasons set forth in this Opposition.

namely, that Section 7 of the General Allotment Act (25 U.S.C. § 381) precludes any court, including this Court, from resolving this important question in favor of transferability to non-Indians.

But the question of transferability of *Winters* rights to non-Indians is not unsettled; on the contrary, it has been settled for more than fifty years in perfect accord with the opinion as to which certiorari is now sought — and without any divergent holding until that of the District Court below. Moreover, the very cases which settle the question of transferability also preclude any argument that Section 7 of the General Allotment Act (25 U.S.C. § 381) can or should be read to force an opposite conclusion.

The earliest cases in the lower courts dealing with transferability of *Winters* rights to non-Indians presented the question, first in the context of non-Indian leasehold estates,[2] then in the context of estates of non-Indians in fee simple.[3] In both cases, the issue was resolved in favor of transferability of *Winters* rights to non-Indians; *i.e.*, in the same way that the Ninth Circuit has resolved the issue in its decision on rehearing in this case.

The issue reached this Court in *United States* v. *Powers*, 305 U.S. 527 (1939). In *Powers*, the United States brought suit, on behalf of an irrigation project serving Indians on an Indian reservation, to enjoin certain non-Indian successors in title to Indians from diverting waters of the Reservation's streams at points above the Indian irrigation project. It was established that, as a result of the defendants' several diversions, there was insufficient water for the Indians served by the plaintiff's project.

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[2] *Skeem* v. *United States*, 273 F. 93 (9th Cir. 1921).

[3] *United States ex rel. Ray* v. *Hibner*, 27 F.2d 909 (D. Idaho 1928).

United States v. *Powers*, 16 F.Supp. 155, 158-59 (D. Mont. 1936).

The District Court in *Powers* held that the defendants had succeeded to *Winters* doctrine water rights appurtenant to their lands. Since such rights were of equal priority with *Winters* rights retained by Indians, the District Court denied the injunctive relief requested by the plaintiff. However, the District Court went beyond the denial of injunctive relief and, despite the absence of necessary parties, affirmatively decreed to the defendants a specific quantum of water. 16 F. Supp. at 164.

On appeal, the Court of Appeals for the Ninth Circuit agreed with the District Court's denial of injunctive relief, citing, *inter alia*, its prior decision in *Skeem* v. *United States*, 273 F. 93 (9th Cir. 1921), *supra* n. 2, which held that a non-Indian lessee of an Indian allotment acquires *Winters* water rights as an appurtenance to his leasehold. The Court of Appeals recognized, however, that the District Judge had erred in decreeing a specific amount of water to defendants in the absence of necessary parties. It accordingly ordered the decree modified by striking therefrom the affirmative relief granted to defendants. *United States* v. *Powers*, 94 F.2d 783, 786 (9th Cir. 1938).

In this Court, the government did not argue that allottees could not convey their *Winters* rights to non-Indians, but assumed that they could, and argued instead that the creation of the irrigation project, which was completed before the allotment of respondents' lands, had served to "dedicate and reserve" all water necessary to irrigate lands under the project, with the result that the respondents' Indian predecessors in title had never themselves owned *Winters* water rights.

This Court affirmed the Court of Appeals, concluding that the plaintiff United States had "shown no right" to

an injunction. *United States* v. *Powers*, 305 U.S. 527, 533 (1939). The Court reasoned that the provision for just and equal distribution of available water among Indians residing on the Reservation, contained in Section 7 of the General Allotment Act (25 U.S.C. §381) *would not permit* a conclusion that allottees outside of a government project be treated unjustly and unequally vis-a-vis Indians on lands within a government project. The Court observed that the non-Indian respondents had "succeeded to the interest of the original allottees either by mesne conveyance or by purchase at government sales" and that their argument, that they succeeded to some portion of tribal waters essential for cultivation of their lands, was well founded.

This Court in *Powers* was mindful, as the Court of Appeals had been, of the impropriety of *quantifying* the respondents' rights in an action to which others who would be affected were not parties. Accordingly, its holding was limited to respondents' general claim of succession to the Indian right, and the matter of the extent or precise nature of respondents' rights in the water was not considered. *Id.* at 533.

Since the defendants in *Powers* were not allottees, but were non-Indian successors to allottees, it is clear that this Court there *held* that non-Indians, as transferees of allotments, could acquire appurtenant rights to reserved water equal in priority with the *Winters* rights asserted by the United States on behalf of the Indians; otherwise the United States would clearly have been entitled to injunctive relief on the record made.[4] Thus, this Court plainly

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[4] In his classic treatise on Indian law, Professor Cohen, a learned and universally respected authority, stated that *Powers* "compels the view that the right to use water is a right appurtenant to the land within the reservation, and that unless excluded it passes to each grantee in subsequent conveyances of allotted land." F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 220 (1940).

held in *Powers* that allottee water rights are transferable to non-Indians.[5]

In *United States* v. *Ahtanum Irrigation District*, 236 F.2d 321 (9th Cir. 1956), *cert. denied*, 352 U.S. 988 (1957), the Ninth Circuit stated its understanding of this Court's opinion in *Powers*[6] and, consistent with that understanding, held that non-Indian successors to allotments on the Yakima Reservation in Washington were entitled as such to "participate ratably" with Indian allottees in waters reserved under the *Winters* doctrine. 236 F.2d at 342.[7]

[5] The Court of Appeals, in its long footnote 13 on rehearing of this case, 647 F.2d at 50 n.13, seems to take the view that this Court's denial of injunctive relief to the government in *Powers* was a holding that the government's contention that Indian allottees had not acquired *Winters* rights was erroneous, but that it was *not* a holding that the non-Indian respondents had succeeded to Indian *Winters* rights. It is respectfully submitted that, since the respondents were non-Indians, it was necessarily a holding as to both. Certainly, the Ninth Circuit did not read *Powers* in this extremely narrow and technical way in its *Ahtanum* decision, discussed above in the text, and in notes 6 and 7, *infra*.

[6] The Court of Appeals said:

> These defendants [non-Indians] claim that as successors to certain original Indian allottees for whom the waters were reserved and for the benefit of whose lands the Indian ditches were constructed, [they] acquired a vested interest in and a right to the distribution of the waters . . . to the same extent as if their lands were still in the possession of the original allottees. *That they did originally acquire such a right through purchase of allotments seems clear from* United States v. Powers, 305 U.S. 527, 59 S.Ct. 344, 83 L.Ed. 330. *That case holds that white transferees of such fee patented Indian allotments were equally with individual allottees beneficially entitled to distribution of the waters diverted for the Indian irrigation system.* 236 F.2d at 342 (Emphasis added).

[7] In *Ahtanum*, the United States operated an Indian irrigation ditch or system on the Yakima Reservation in the State of Washington. This system diverted water from Ahtanum Creek on the northern

boundary of the Reservation, and distributed it within the Reservation. About one-third of the lands served were owned by transferees of fee patented Indian allotments, most or all of whom were non-Indians; about two-thirds of the lands served were owned by Indian allottees. *United States* v. *Ahtanum Irrigation District*, 124 F. Supp. 818, 823-4, 829 (E.D. Wash. 1954). Non-Indian entrymen to the north of Ahtanum Creek also diverted water from Ahtanum Creek to irrigate their off-Reservation lands.

The water flow of Ahtanum Creek was insufficient to irrigate all these lands. Accordingly, the United States, as trustee for the Yakima Indians, brought suit to establish and quiet its title under the *Winters* case to all water needed to irrigate Reservation lands.

The United States named as defendants the non-Indian entrymen north of the creek. These off-Reservation defendants claimed 75% of the water flow under a 1908 agreement executed by the Department of the Interior. The United States also named as defendants the non-Indians served by its own Indian irrigation system. According to the District Judge who tried the case, these so-called Class Three Defendants in fact participated "by what amounts to intervention." 124 F.Supp. at 829. The Court of Appeals' opinion sets out the contentions made by the Class Three Defendants, *i.e.*, that as successors to original Indian allottees for whom the waters were reserved and for the benefit of whose lands the Indian ditches were constructed, they acquired a vested right to waters to the same extent as if their lands were still in the possession of the original allottees. 236 F.2d at 342.

As noted by the Court of Appeals, the District Court in *Ahtanum* held that the *Winters* decision did not apply and rejected the claims of the United States and of the Class Three Defendants based thereon. As to the Class Three Defendants, the District Judge also sustained a plea that their claims as against the off-Reservation landowners would in any event be barred by limitations. 236 F.2d at 342.

On appeal the Court of Appeals reversed, holding that the *Winters* decision did apply. The court also very reluctantly concluded that the 1908 agreement, though improvident in light of the reservation of waters resulting from the *Winters* decision in that same year, was nonetheless binding and effective. However, it went on to hold that the United States was entitled to a decree, and it took great pains to point out that on remand the 1908 agreement should be narrowly construed to run only to particular uses in 1908, at particular times,

No decision to the contrary (apart from the District Judge's opinion, and the now-withdrawn, initial opinion of the Ninth Circuit in the instant case) has been cited, or, to the Walton respondents' knowledge, exists.[8]

Accordingly, the principal question as to which certiorari is sought is not unsettled, as assumed by Petitioners. On the contrary, the question is and has for some time been settled in perfect accord both with the Ninth Circuit's previous decision in *Ahtanum* and with its deci-

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by particular individuals, and not to all future uses of the off-Reservation public. It accordingly held that any current use in excess of these limitations as to use, or time of use, or by one who could not deraign his title from a signatory to the agreement, would diminish the acreage benefited by the 1908 allocation and, in like measure, would increase the share of the flow to be decreed to the United States under *Winters*. 236 F.2d at 339-42.

At page 342, the Court of Appeals addressed the contentions made by the Class Three Defendants respecting their claim of right to participate ratably with Indian allottees in waters decreed to the United States, and as stated, declared that limitations did not bar their claims, and that they were entitled to participate ratably on an equal basis with Indian allottees in waters decreed to the United States.

Upon remand of *Ahtanum* to the District Court, trial there before a master, and a second review by the Court of Appeals, substantial waters were in fact decreed to the United States, in a decree fashioned by the Court of Appeals. 330 F.2d 897 (9th Cir. 1964), *rehearing denied*, 338 F.2d 307 (1964), *cert. denied*, 387 U.S 924 (1965). This demonstrates beyond doubt that the Ninth Circuit's declaration in *Ahtanum* as to the entitlements of the non-Indian transferees of Indian allotments was not dictum, as the Ninth Circuit intimated in its now withdrawn opinion, but was the *holding* of the court.

[8] There is, however, a decision by the United States District Court for the District of Oregon, decided after the District Court's opinion in this case, in which the District Judge refused to follow the District Judge's opinion in this case and held in accordance with the settled rule. *United States* v. *Adair*, 478 F.Supp. 336 (D. Ore. 1979).

sion on rehearing now before the Court on petition for *certiorari*. Accordingly, the writ should not issue.[9]

As for petitioner's contention that the provision for just and equal distribution of water contained in Section 7 of the General Allotment Act (25 U.S.C. § 381) precludes any court, including this Court, from recognizing transferability of *Winters* water rights to non-Indians, this question is likewise settled. As already noted, this Court in its *Powers* decision rejected a contention by the government that its irrigation project serving only Indians constituted a regulation pursuant to Section 7 precluding non-Indian successors to Indian allotments not served by the government's project from any use of the water concerned. In the context of the holding of the Court, denying injunctive relief against the non-Indian successors to Indian allottees, it is plain that this Court does not read section 7 as precluding non-Indian successors to allottees from participating ratably in reserved waters. *Accord, United States* v. *Ahtanum Irrigation District, supra* at 342; *United States* v. *McIntire, supra* at 654.

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[9] With respect, it is submitted that the Court of Appeals, in its footnote 18, 647 F.2d at 54 n.18, is simply in error in describing the transferability question as "an area of great unrest and uncertainty," as to which "[a] definitive resolution is overdue." As shown in this brief, the issue has been settled in favor of transferability for fifty years.

CONCLUSION

The writ of certiorari should be denied.

Respectfully submitted,

FRANK J. MARTIN, JR.
JOHN D. SHARER
SUTHERLAND, ASBILL & BRENNAN
1666 K Street, N.W., Suite 800
Washington, D.C. 20006
(202) 872-7800
Attorneys for Respondents
William Boyd Walton, *et ux.*

Of Counsel:

RICHARD B. PRICE
Post Office Box 904
435 Maple Street
Omak, Washington 98841
(509) 826-5110

Opposition

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Nos. 81-321 and 81-421

In the Supreme Court of the United States

OCTOBER TERM, 1981

COLVILLE CONFEDERATED TRIBES, PETITIONERS

v.

BOYD WALTON, JR., ET AL.

STATE OF WASHINGTON, PETITIONER

v.

UNITED STATES, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

CAROL E. DINKINS
Assistant Attorney General

ROBERT L. KLARQUIST
BRUCE C. RASHKOW
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether a non-Indian who purchases a former allotment within an Indian reservation may acquire a right to share in some portion of the water right reserved upon the creation of the reservation.

2. Whether a state has jurisdiction to regulate the use of non-reserved water in No Name Creek, a non-navigable stream located entirely within the Colville Indian Reservation that does not supply water to users off the Reservation.

3. Whether petitioner Tribes have a reserved water right that may be used for the maintenance of a fishery in the lower reaches of No Name Creek.

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UNITED STATES, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (81-421 Pet. App. F-1 to F-20) is reported at 647 F.2d 42. A prior opinion of the court of appeals (81-421 Pet. App. E-1 to E-17), since withdrawn, has not been

reported. The opinion of the district court (81-421 Pet. App. A-1 to A-24) is reported at 460 F. Supp. 1320. Three other orders of the district court (81-421 Pet. Apps. B, C and D) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 1, 1981. Petitions for a writ of certiorari were filed by the Colville Confederated Tribes on August 18, 1981, and by the State of Washington on August 28, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Section 7 of the General Allotment Act of Feb. 8, 1887, ch. 119, 24 Stat. 390, 25 U.S.C. 381, provides:

> In cases where the use of water for irrigation is necessary to render the lands within any Indian reservation available for agricultural purposes, the Secretary of the Interior is authorized to prescribe such rules and regulations as he may deem necessary to secure a just and equal distribution thereof among the Indians residing upon any such reservations; and no other appropriation or grant of water by any riparian proprietor shall be authorized or permitted to the damage of any other riparian proprietor.

STATEMENT

1. In 1871, the predecessors of the Colville Confederated Tribes consisted of several tribes with which the United States had no treaty and for which no reservation had been established. After the Civil War, immigration into the Washington Territory increased, resulting in encroachment upon these Indians' lands. To avoid conflict, President Grant created the Colville Reservation by Executive Order of July 2, 1872. 81-421 Pet. App. F-2 to F-3, H-1.

The Reservation originally included 2.8 million acres, but it was reduced to 1.3 million acres 20 years later when the northern half of the Reservation was restored to the public domain and opened to settlement. Act of July 1, 1892, ch. 140, 27 Stat. 62. In 1906, Congress ratified an agreement between a majority of the tribal members and the United States, which provided for the allotment of lands within the "diminished" Reservation to individual Indians pursuant to the General Allotment Act of 1887, and for settlement of surplus unallotted lands within the diminished Reservation. Act of Mar. 22, 1906, ch. 1126, 34 Stat. 80.[1] Despite the alienation of tracts to non-Indians, the whole of the "South Half" of the original area remains in Reservation status. See *Seymour* v. *Superintendent*, 368 U.S. 351 (1962).

The present case concerns a small watershed that lies entirely within the Colville Indian Reservation. This watershed is drained by a small, non-navigable stream, known as "No Name Creek." Arising from a spring on the Reservation, No Name Creek flows southward across the Reservation for approximately three miles and then empties into Omak Lake, a saline body of water with no outlet that is also confined entirely within the Reservation.

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[1] The Reservation remained open to settlement until 1934, when the Secretary of the Interior, pursuant to the Indian Reorganization Act, ch. 576, 48 Stat. 984, 25 U.S.C. 461 *et seq.*, "temporarily" withdrew from entry all surplus lands. In 1956, Congress restored the surplus lands within the Reservation to the beneficial ownership of the Tribes. Act of July 24, 1956, ch. 684, 70 Stat. 626. In passing this Act, Congress acknowledged that the validity of the Tribes' original consent to opening up the Reservation for settlement was subject to question. See H.R. Rep. No. 2080, 84th Cong., 2d Sess. 2 (1956).

Beginning in 1917 (81-421 Pet. App. F-3), seven allotments were created in the watershed along No Name Creek. Four of the allotments are held in trust by the United States for the benefit of individual heirs of the original allottees[2] or, in one case, for the Tribes themselves. See the Map appended to the district court's opinion, 81-421 Pet. App. A-20. The remaining three allotments, consisting of 350 acres, are now owned by respondents Mr. and Mrs. Boyd Walton, Jr., and Mr. and Mrs. Wilson (hereinafter the "Walton respondents"), non-Indians who acquired the lands in 1948 from a non-Indian successor in interest to three Indian allottees. 81-421 Pet. App. A-3, F-3.[3] No part of the land now owned by the Waltons was irrigated at the times the allotments passed from Indian ownership to the Waltons' non-Indian predecessor. 81-421 Pet. App. A-3, F-3. However, when the Waltons acquired the property in 1948, 32 acres were irrigated. *Ibid.* The Walton respondents then procured a permit from the State to irrigate 65 acres, " 'subject to existing rights.' " *Ibid.* At the time of this suit, the Waltons irrigated a total of 104 acres and used additional water for domestic and stock water purposes. *Ibid.*

2. The Tribes instituted their action against the Waltons in 1970, alleging that the Tribes were the

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[2] The Tribes have long-term leases for the use of these three allotments. 81-421 Pet. App. F-3.

[3] The Waltons actually purchased the allotments from an Indian, not a member of the Colville Confederated Tribes, who previously had purchased from a non-Indian. 81-421 Pet. App. A-3, F-3. For present purposes, the non-member Indian properly may be regarded as a non-Indian. *Washington* v. *Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 160-161 (1980).

owners of the water in No Name Creek and that the Waltons were appropriating the Creek's entire flow without their approval. The Tribes requested an injunction against this allegedly unauthorized appropriation. In their answer, the Waltons contended that they were entitled to water from No Name Creek, both as successors in interest to the original allottees and by appropriation under state law. 81-421 Pet. App. A-2 to A-3. Thereafter, the State was allowed to intervene as a party defendant to assert its authority to "regulate and control" all waters on the Reservation above the amount reasonably needed to satisfy the purposes for which the Reservation was created.

Following the State's intervention, the United States filed a separate action in 1973 against the Waltons and the State on its own behalf and on behalf of the Tribes and their members. The two actions were consolidated for trial. Thereafter, the Tribes filed an amended complaint in which they asserted a right to water for maintaining the flow of No Name Creek for the spawning of the Lahontan Cutthroat trout, an anadromous species introduced into Omak Lake in 1968. 81-421 Pet. App. A-4. No Name Creek is the only fresh water source for the Lake; thus, it is the only possible source for natural spawning of the fish. The trout are propagated in a federal hatchery and freely made available to the Tribes. *Ibid.*

3. On October 25, 1978, the trial court held that when the Reservation was established, the United States reserved water to fulfill the purposes of the Reservation. 81-421 Pet. App. A-5 to A-6. The court further held that, upon the acquisition of an allotment by an individual Indian, the right to such waters became appurtenant to his land with a priority date of the creation of the Reservation and

that this right continued after the Indian acquired the allotted land in fee. 81-421 Pet. App. A-7. The court concluded, however, that this reserved right could not be transferred to a non-Indian. In the court's view, upon the sale of his property to a non-Indian, an Indian allottee transferred a right only to such water as he had appropriated at the time of the conveyance, with a priority date of his first appropriation. 81-421 Pet. App. A-7 to A-12.

The district court declined to recognize, at the present time, a reserved right to water for the spawning of the Lahontan Cutthroat trout. Although it acknowledged that fish were a traditional food source for Washington Indians and that the natural source of fish on the Reservation was eliminated by the construction of dams on the Columbia River, the court deemed recognition of a reserved water right for the purpose of sustaining spawning grounds for the Lahontan trout unnecessary so long as fish were made available to the Tribes from the federal hatchery. 81-421 Pet. App. A-15 to A-16. However, by post trial motion, the Tribes sought and obtained permission to use for trout spawning some of the water reserved for irrigation purposes. See 81-421 Pet. App. D-2 to D-3.

Finally, the district court held that the State of Washington has jurisdiction to regulate and control the use of waters on the Colville Reservation in excess of the amount necessary to satisfy the Indians' reserved water right and to issue permits for the use of such water. Correspondingly, the district court held that application of the Tribes' water code must be limited to regulation of the reserved water right held in trust for the Tribes and their members.

In quantifying the water rights on the Reservation, the court found that, on average, 1,000 acre feet of

water are available each year. Of this amount, the court found that 666.4 acre feet are reserved to the members of the Tribes for potential irrigation of the 166.6 acres on three Indian-held allotments and certain tribal lands in the No Name Creek drainage basin that the court found to be irrigable. 81-421 Pet. App. A-14, C-2.[4] Although the Tribes also had claimed a reserved water right to irrigate Allotment 526, which is located in the No Name Creek drainage basin, the court declined to recognize a reserved right in No Name Creek waters for this purpose at the present time because of the possibility that water would be available for this tract from another creek that traversed Allotment 526. 81-421 Pet. App. A-13, C-2. The court did, however, determine a water duty of 247.2 acre feet annually which it held must be available to irrigate Allotment 526, even though it declined to determine whether this water must come from No Name Creek or the other stream, Omak Creek, or both. 81-421 Pet. App. C-2.

Finally, in a subsequent order quantifying rights for the year 1979, the court held that the Waltons had a presently protected right to use 260 acre feet of water from No Name Creek. This amount apparently was calculated by multiplying the 65 acres for which the Waltons had obtained a water permit from the State (81-421 Pet. App. A-3) by the 4.0 acre feet per acre water duty the court had found for the Indian-held lands in the basin (81-421 Pet. App. A-13, C-2).

4. a. On appeal, the court of appeals affirmed the district court's holding that when the Colville Reservation was established, the United States reserved

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[4] The court determined that 428.8 acre feet would be required each year to irrigate the 107.2 acres the Tribes then had under irrigation. 81-421 Pet. App. A-13, D-2.

the right to sufficient water to fulfill the purposes of the Reservation.[5] The court of appeals reversed the district court's determination that the Waltons, as non-Indian fee owners of allotted land, could not share in that reserved water right. Instead, following earlier decisions in *United States* v. *Hibner*, 27 F.2d 909 (D. Idaho 1928), and *United States* v. *Adair*, 478 F. Supp. 336 (D. Or. 1979), the court held that a non-Indian purchaser from an Indian allottee acquires a right, with a date of reservation priority, to water that was being appropriated by the allottee at the time title passed from Indian ownership plus any additional amount the non-Indian appropriates with "reasonable diligence" after the passage of title. Under the court of appeals' holding, if the full measure of the Indian's reserved water right is not acquired through the exercise of reasonable diligence and maintained by continued use, it is lost to the non-Indian successor. 81-421 Pet. App. F-11 to F-15. The court therefore remanded this issue to the district court to determine the extent of the Waltons' right to share in the Indians' reserved water right under the "reasonable diligence" standard. *Id.* at F-15.

b. The court of appeals also held, contrary to the conclusion of the district court, that the State has no power to regulate water in the No Name Creek water system and that the Walton respondents' State-issued water permit therefore was of no force and effect. 81-421 Pet. App. F-16 to F-19. Two sets

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[5] The court of appeals first issued an opinion on August 20, 1980, affirming the district court in all major respects. 81-421 Pet. App. E. Petitions for reconsideration on certain aspects of that opinion were filed by the Walton respondents and the State. On June 1, 1981, the Court granted the petitions and withdrew and replaced its earlier opinion.

of factors were central to the court's determination.

First, the court noted that a water system is a unitary resource in which the actions of one user may have an immediate and direct effect on other users. The court noted that the Tribes had alleged in their complaint that the Walton respondents' diversions imperiled the agricultural use of downstream tribal lands and the trout fishery. 81-421 Pet. App. F-17. The court observed in this regard (*ibid.*) that this Court had indicated in *Montana* v. *United States*, No. 79-1128 (Mar. 24, 1981), slip op. 20, that an Indian tribe may retain civil authority over non-Indians on fee lands within its reservation when their conduct threatens or has some direct effect on the health or welfare of the tribe. Thus, the court reasoned that the critical importance to the residents of the Colville Reservation of the regulation of water formed an important part of the backdrop for its consideration of the application of state law in this case. *Ibid.*

Second, the court stressed that "[t]he geographic facts of this case [made] resolution of this issue somewhat easier than it otherwise might be [because] [t]he No Name water system is non-navigable and is entirely within the boundaries of the reservation" (81-421 Pet. App. F-17). Similarly, the court noted that "[a]lthough some of the water passes through lands now in non-Indian ownership, all of those lands are also entirely within the reservation boundaries" (*ibid.*). Thus, the court concluded that "the state's interest in extending its water law to the reservation is limited in this case [because] [t]ribal or federal control of No Name waters will have no impact on state water rights off the reservation" (*id.* at F-19).

Accordingly, while acknowledging the deference Congress ordinarily shows to state water law (81-421 Pet. App. F-19, citing *United States* v. *New*

Mexico, 438 U.S. 696, 702 (1978)), the court found the general rule inappropriate in the case of water use entirely within an Indian reservation, as is true here, at least where such use has no impact off the reservation. Pet. App. F-19, citing *FPC* v. *Oregon*, 349 U.S. 435, 448 (1955). In these circumstances, the court concluded, the rationales underlying congressional deference to state water law—permitting the western states to fashion water right regimes that are responsive to local needs and avoiding the confusion that would arise if federal and state water law reigned side by side in the same locality (81-421 Pet. App. F-19, citing *California* v. *United States*, 438 U.S. 645, 653-659, 668-669 (1978))—are not applicable (81-421 Pet. App. F-19).

c. Finally, the court of appeals determined that the Tribe has a right to use reserved water to maintain the Omak Lake Fishery, including sufficient water to permit natural spawning of the trout.

ARGUMENT

Contrary to petitioners' contentions, this case does not present any issues warranting review by this Court at the present time. The Tribes seek to challenge the court of appeals' holding that a non-Indian purchaser of an Indian allotment may acquire a right to share in some portion of the tribal reserved water right. But this challenge is prematurely presented, because the court of appeals remanded for further proceedings to determine whether the non-Indian respondents have actually acquired such a right; and, in any event, the Tribes' challenge would appear to be foreclosed by this Court's decision in *United States* v. *Powers*, 305 U.S. 527 (1939), and a consistent line of lower court decisions.

The State of Washington petitions for certiorari principally to assert a right to control and regulate

the use of waters on an Indian reservation in excess of those needed to satisfy the Indians' reserved water right. But the court of appeals resolved this issue in the present case only in the unique context of a small water system that is situated entirely within the boundaries of an Indian reservation and does not service users off the reservation. In such circumstances, the balance of the competing federal, tribal, and state interests is quite different from that which will obtain in the far more typical situation of a water system that extends off the reservation and supplies landowners and others outside the reservation boundaries. Thus, this case does not present a suitable occasion for the Court to resolve the general question of the relationship among federal, tribal, and state water law on an Indian reservation in a manner that would afford adequate guidance to the lower courts in other cases. Moreover, even in this case, the practical importance of the applicability of state law appears to be limited to whether the State may issue permits for the appropriation of "excess" water to be used on land owned by the Walton respondents, the only non-Indian landowners in the water system. But if the lower courts should determine in further proceedings that these respondents have a right to share in the Tribes' *reserved* water right, there will be no occasion to recognize a state-law right in these respondents to appropriate "excess" water—if indeed any "excess" water remains after satisfying all reserved water rights.

Finally, the State seeks certiorari on the subsidiary issue whether the Tribe may use reserved water to maintain a fishery in the No Name Creek and Omak Lake. Contrary to the State's contention, however, it is not even clear that the court of appeals recognized an *additional* reserved water right—over and above that recognized for irrigation—to main-

tain the fishery. The opinion may be read simply to permit a change in the use, for fishery purposes, of a portion of the reserved water right that the State concedes the Tribes possess for irrigation purposes. If the opinion is read in this fashion, the fishery issue plainly does not warrant review, for such a change in use would have no effect on the amount of "excess" or non-reserved water available for other purposes. The scope of the court of appeals' opinion in this regard may be clarified in further proceedings in the lower courts. But even if the court of appeals' decision ultimately might be read to recognize an additional reserved water right for fishery purposes, that result, reached in the unique circumstances of this case, does not warrant further review at the present time.

1. Petitioners Colville Confederated Tribes urge (81-321 Pet. 15-30) that certiorari be granted to review that portion of the judgment of the court of appeals holding that a non-Indian purchaser from an Indian allottee may acquire the allottee's share of the water right reserved by the federal government when the Indian reservation was created. This issue is presented in an interlocutory posture, however: the precise holding of the court of appeals was that a non-Indian acquires a reserved water right, with a priority date of the establishment of the reservation, to water actually being appropriated by the Indian allottee when title passed plus any additional water that the non-Indian appropriated with "reasonable diligence" after title passed. 81-421 Pet. App. F-15. The court remanded for a determination of the number of irrigable acres owned by the Walton respondents—the only non-Indian landowners in the watershed—and the amount of water they appropriated with reasonable diligence, in order to determine the extent of their right to share in reserved water.

Ibid.[6] Thus, there has not yet been a determination of the extent, if any, to which the Walton respondents are entitled to share in the reserved water right under the court of appeals' decision. There will be time enough for this Court to consider the transferability to non-Indians of water rights reserved for an Indian reservation after the proceedings on the "reasonable diligence" issue have been completed in the lower courts, should the parties be dissatisfied with the outcome of those proceedings. Review of this issue at the present time therefore is unnecessary.

In any event, as the Walton respondents have explained (81-321 Br. in Opp. 8-14), the holding of the court of appeals that a non-Indian purchaser of an Indian allotment may succeed to a share of a reserved water right would appear to be fully consistent with this Court's decision in *United States* v. *Powers*, 305 U.S. 527 (1939), and with the decisions of the lower courts that have considered the question. In *Powers*, the United States brought an action to enjoin diversion by non-Indian purchasers of allotments on the Crow Reservation in Montana. The United States contended that the Tribe had a reserved right to the water in question and that non-Indian landowners did not acquire a right to share in that right when they purchased allotted lands

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[6] Although there is some dispute as to when the former allotments now owned by the Walton respondents first passed into non-Indian ownership (81-321 Pet. 7), it appears to be undisputed that the Indian allottees had not irrigated any lands prior to the time they sold the allotments (81-421 Pet. App. A-3). Accordingly, under the court of appeals' decision, the Walton respondents could acquire a right to share in the reserved water right only if, after non-Indians purchased the allotments, "reasonable diligence" was utilized in appropriating water for use on the former allotments. As noted in the text, this issue remains open on remand.

from members of the Crow Tribe. This Court affirmed the lower courts' denial of an injunction, finding "well founded" the non-Indian landowners' claim "that when allotments of land were duly made for exclusive use and thereafter conveyed in fee, the right to use some portion of tribal waters essential for cultivation passed to the owners" (305 U.S. at 532).

The Court in *Powers* also rejected the contention, similar to that advanced by petitioners Colville Tribes in this case (81-321 Pet. 21-30), that Section 7 of the General Allotment Act of 1887, ch. 119, 24 Stat. 390, 25 U.S.C. 381, manifests a congressional intent that the entire water right reserved for use on irrigable acreage on an Indian reservation continues to belong to the Tribe even after individual parcels of irrigable land are allotted in fee and sold to non-Indians.[7] The Court observed that Section 7 authorizes the Secretary to promulgate regulations "to secure a just and equal distribution [of water] among the Indians residing upon [the] res-

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[7] The Tribes' contention that the General Allotment Act contemplated that the reserved water right would be retained as a tribal asset even after reservation land was allotted and subsequently conveyed in fee also is inconsistent with Congress' expectation in 1887 that the General Allotment Act would result in the eventual dissolution of tribal affairs. See *Montana* v. *United States*, No. 79-1128 (Mar. 24, 1981), slip op. 13-14; *United States* v. *Mitchell*, 445 U.S. 535, 543-544 & nn.4, 5 (1980). The allotment policy was repudiated in 1934 by the Indian Reorganization Act, ch. 576, 48 Stat. 984, 25 U.S.C. 461, and this repudiation is of course relevant to the issue of the State's present authority over the distribution of water within the Colville Reservation. See pages 16-23, *infra*. But the relevant point for present purposes is what property rights were transferred when allotted lands were alienated *pursuant to* the General Allotment Act while that Act was being implemented. See *Montana* v. *United States*, *supra*, slip op. 13 n.8.

ervation," and reasoned that this section therefore does not permit the Secretary affirmatively to authorize an unjust and unequal distribution. Thus, the Court concluded, Section 7 "clearly indicates Congressional recognition of equal rights among resident Indians" (305 U.S. at 533). Because only the rights of *non*-Indian landowners were at issue in *Powers*, the implication of the Court's decision is that Section 7 likewise does not bar non-Indians from succeeding to at least a portion of the allottee's just and equal share of the tribal reserved water right.[8]

Against this background, *Powers* must be read as a rejection of the Tribes' argument that the non-Indian purchasers from the allottees cannot share in a portion of the reserved water right. Felix Cohen's

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[8] The Court in *Powers* "[did] not consider the extent or precise nature of [non-Indian landowners'] rights in the waters" (305 U.S. at 533), apparently because of the absence of all parties necessary in order for a court to quantify the water rights. See *United States* v. *Powers*, 94 F.2d 783, 786 (9th Cir. 1938). Similarly, in the present case, the court of appeals did not determine the extent, if any, of the Walton respondents' reserved water right, but instead remanded for (1) a consideration of the degree, if any, to which they or their predecessors in interest had satisfied the court's requirement that a non-Indian must exercise reasonable diligence in appropriating water, and (2) a quantification of any reserved water right so obtained. 81-421 Pet. App. F-15; see also *United States* v. *Adair*, *supra*, 478 F. Supp. at 348-349; *United States* v. *Hibner*, *supra*, 27 F.2d at 912. The Walton respondents have not petitioned for certiorari to seek review of the court of appeals' requirement that they must satisfy a reasonable diligence test in order to perfect their reserved water right, apparently because they believe they will satisfy that test on remand or because they intend to seek review in this Court of this legal issue if they do not. In any event, the propriety of the condition subsequent of "reasonable diligence" is not properly before the Court on the petitions of the State and the Tribes.

Handbook of Federal Indian Law (1942), so reads *Powers*, stating that the decision "compels the view that the right to use water is a right appurtenant to the land within the reservation, and that unless excluded it passes to each grantee in subsequent conveyances of allotted lands." *Id.* at 220. See also Department of the Interior, *Federal Indian Law* 786 (1958).

The decision below also is fully consistent with a line of cases in the Ninth Circuit that likewise have rejected the contention that non-Indian purchasers of allotments do not have a right to share in the tribal reserved water right. *United States* v. *Ahtanum Irrigation District*, 236 F.2d 321, 342 (9th Cir. 1956), cert. denied, 352 U.S. 988 (1957); *United States* v. *Adair*, 478 F. Supp. 336 (D. Or. 1979); *United States* v. *Hibner*, 27 F.2d 909 (D. Idaho 1928). The issue has not arisen in other circuits, and, perforce, there is no conflict among the circuits requiring resolution by this Court. Therefore, unless *Powers* itself is to be reconsidered, the holding below that the Walton respondents may succeed to a portion of the Tribes' reserved water right plainly does not warrant review by this Court.[9]

2. a. The State of Washington seeks review (81-421 Pet. 8-19) of the court of appeals' holding (81-421 Pet. App. F-16 to F-19) that the regulation of the use of water in the No Name Creek water system is governed by federal or tribal law, not state law. The State concedes that the issue of the applicability of state law to the distribution of water within the boundaries of an Indian reservation in circumstances

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[9] While opposing certiorari on this issue at this time, we do not intend to foreclose ourselves from arguing that *Powers* should be reconsidered or qualified, should the Court determine to review the present case. The United States has reached no concluded view on that question.

such as these is one of first impression (81-421 Pet. 21), that there has been "surprisingly sparse" litigation regarding the relationship between state water codes and reserved water rights (*id.* at 10), and that "[i]n fact, [such] relationships have mainly been harmonious" (*ibid.*). But the State nonetheless argues that the decision below on this question warrants review, apparently because of what it perceives (81-421 Pet. 8, 11-12, 17-19) to be a broad implication of the court of appeals' decision: that state water law is completely ousted from any application on any Indian reservation.

Contrary to the State's broad characterization of the decision below, however, the court of appeals repeatedly and explicitly limited its holding to the regulation of waters in the No Name Creek water system. 81-421 Pet. App. F-16 to F-19. Indeed, the court took pains to point out that the geographic facts of this case—that the water system is nonnavigable and located entirely within the Reservation, and that the non-Indian owned lands traversed and served by No Name Creek are likewise within the Reservation—made resolution of the issue of state regulatory authority easier than it otherwise might be. *Id.* at F-17. Thus, the court quite plainly has left for another day the question of the applicability of state law under other circumstances—*e.g.*, where the stream or other body of water on the reservation is navigable (cf. *Montana* v. *United States*, No. 79-1128 (Mar. 24, 1981), slip op. 4-10 [10]) or where the

[10] In *Montana*, the Tribe sought to establish its claim to control fishing in the Big Horn River on the Crow Reservation in part by asserting a claim to ownership of the bed of that River. Slip op. 4. The Court held, however, that because the River was navigable, its bed passed to the State upon admission to the Union (*id.* at 5-10), thereby removing this possible basis of tribal regulatory authority.

water system involved extends outside of the reservation or serves water users beyond the reservation boundaries (see *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136, 151 (1980); *Washington* v. *Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 157 (1980); cf. *Central Machinery Co.* v. *Arizona State Tax Commission*, 448 U.S. 160, 169-170 (1980) (Stewart, J., dissenting). The opinion of the Ninth Circuit in this case therefore does not oust state water law from application on Indian reservations generally, or even from application to those portions of the Colville Reservation itself that are outside of the No Name Creek basin.[11]

Moreover, the importance of the court of appeals' decision is limited even when it is viewed in the context of the No Name Creek water system alone, as it must be. The State's assertion of a right to control the distribution of waters extends only to "ex-

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[11] As a result, for example, permits issued by the State of Washington for the appropriation of water from the Columbia River (which borders the Reservation, see 81-421 Pet. App. A-20) and its tributaries are not rendered invalid by the decision of the court of appeals in this case; nor are the other 136 permits the State asserts (81-421 Pet. 4) it has issued for the diversion of waters within the exterior boundaries of the Colville Reservation. This case involves only the State permit issued to the Walton respondents. Different considerations would be raised in many, perhaps all of these other situations, because the water system involved would extend off the Reservation or serve water users outside its boundaries. The State's reliance (*id.* at 14) on the Ninth Circuit's own prior decisions in *United States* v. *Ahtanum Irrigation District*, 236 F.2d 321 (9th Cir. 1956), cert. denied, 352 U.S. 988 (1957), and *Conrad Investment Co.* v. *United States*, 161 F. 829 (9th Cir. 1908), therefore is misplaced, for each involved significant diversions for use off the reservation. Compare *United States* v. *McIntire*, 101 F.2d 650, 654 (9th Cir. 1939).

cess" waters in that water system—*i.e.*, waters not needed to satisfy the *reserved* right in those waters.[12] At most, that issue affects no one other than the Walton respondents, the only non-Indian landowners within the boundaries of the No Name Creek basin. See 81-421 Pet. 18. And even that consequence is not certain. As explained above, the court of appeals remanded for a determination whether the Walton respondents have a right to share in the Indians' reserved water right. If the lower courts find that they do have such a right, the question whether the Walton respondents might also have obtained a right under State law to appropriate water for the same purpose would be rendered academic.[13] We note in this regard that the Walton respondents, who would seem to have the greatest interest in securing water for their lands, have not petitioned for certiorari to review the court of appeals' holding that they may not acquire a water right under state law. See 81-321 Br. in Opp. 7 n.1. It may also be that there is no "excess" water in the No Name Creek water system to which the State's asserted regulatory authority could attach in any event.[14]

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[12] See, *e.g.*, Question 1 presented for review, 81-421 Pet. I; see also *id.* at 8-9.

[13] Because the state law right necessarily would have a later priority date than the reserved water right, which runs from the date of the creation of the Colville Reservation, the Walton respondents presumably would have no interest in forsaking the latter in favor of the former.

[14] If the courts below should hold that the Walton respondents have a right to share in the Indians' reserved water right for the 65 acres for which the respondents obtained a state permit, this would result in a water duty of a total of 260 acre feet per year for their land. When added to the 666 acre feet needed to satisfy the Indians' share of the reserved water right, the result would be that at least 926 of the 1,000

Nor, contrary to the State's suggestion (81-421 Pet. 18), does the decision below hold that non-Indian landowners on a reservation will have no means by which to acquire water for use on their lands because the sole source of such a right—state law—has been ousted. First, as explained above, the decision is confined to the No Name Creek water system, and the Walton respondents, the only non-Indian landowners there, may well have a right to share in the Indians' reserved right to water under *federal* law. Second, even if the respondents do not have a right to share in the Indians' reserved right, they would not be without the ability to acquire a right to the use of water, assuming that there is water available in excess of the amount needed to satisfy reserved rights.

Section 7 of the General Allotment Act authorizes the Secretary to prescribe rules and regulations to secure a "just and equal distribution" of waters among Indians residing on the reservation. When the General Allotment Act was passed, Congress no doubt expected that allotted lands could be conveyed in fee at the termination of the trust period and that reservations would cease to exist; but the expectation that reservations would cease to exist was not realized, and the Indian Reorganization Act has now

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acre feet available in an average year will be committed to satisfying reserved water rights. The remaining 74 acre feet is a relatively insignificant amount of "excess" water, and even that amount may be required to satisfy part of the reserved water right of 247.2 acre feet per year for allotment 526 (see page 7, *supra*) or to satisfy a reserved water right for any acreage the Walton respondents have irrigated with "reasonable diligence" in excess of the 65 acres for which they obtained a state permit (they were, for example, irrigating 104 acres at the time this suit was filed, see 81-421 Pet. App. A-3, F-3).

erased it. Given the continued existence of the Reservation in this case, Section 7 of the General Allotment Act reasonably may be construed to authorize the Secretary to secure a fair distribution of waters to non-Indian purchasers of allotments on the Reservation as well as to Indians. See *United States* v. *Powers*, *supra*, 305 U.S. at 533. This would be so, in our view, whether that distribution would be based on the non-Indians' sharing in the Indians' reserved water right or on their obtaining a right to appropriate a suitable portion of any "excess" water. If the non-Indian could appropriate only "excess" water, the Secretary would be free to *adopt* the applicable state water law for purposes of distributing such water. *Wilson* v. *Omaha Indian Tribe*, 442 U.S. 653, 669-676 (1979).[15]

In the present case, for example, an adoption of state law could include a recognition by the Secretary of a priority date of 1948—the year in which the Walton respondents received a permit under state law—for the use of water to irrigate 65 acres of respondents' land. Under such a regime, any other non-reserved right to utilize "excess" waters in No Name Creek asserted after that time—including a

[15] Last January, the Secretary issued proposed regulations pursuant to Section 7 of the General Allotment Act to govern distribution of reserved waters on Indian reservations. 46 Fed. Reg. 944-946 (1981). Those proposed regulations specifically provided for the rights of non-Indian successors to Indian allottees to reserved waters, albeit they recognized a more limited right in non-Indian successors than did the court of appeals here. See proposed 25 C.F.R. 260.3(a)(5), 46 Fed. Reg. 945-946 (1981). Moreover, the Secretary, in proposing the regulations, specifically stated that the regulations do not affect the validity of state-created water rights. 46 Fed. Reg. 945 (1981). Although the Secretary may decide that comprehensive final regulations are unnecessary in this area, he would, of course, retain the authority to take appropriate measures in particular cases should the need arise.

non-reserved right asserted by the Tribes—would be junior to that of respondents. Thus, if the Walton respondents prove to be entitled to share in the Indians' reserved right, but for some reason the water is not made available to them, the Secretary would have ample authority to secure the proper distribution of water to the Walton respondents.[16] If, on the other hand, the Walton respondents prove not to be entitled to share in the reserved water right and rely instead on principles of prior appropriation, but are denied access to any "excess" water available for this purpose, the Secretary (or, if he fails to act, the district court) could issue appropriate orders to protect their use of water.

b. As this Court stated in *White Mountain Apache Tribe* v. *Bracker*, *supra*, 448 U.S. at 144-145:

> "[W]here, as here, a State asserts authority over the conduct of non-Indians engaging in activity on the reservation[,] * * * [the] inquiry is not dependent on mechanical or absolute conceptions of state or tribal sovereignty, but has called for a particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law.

In the present case, the court of appeals, after weighing the various interests at stake in the distribution of waters in No Name Creek, found the State's interests to be insufficiently strong, when compared to

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[16] Thus, for example, if the Tribes were to interfere with the respondents' receipt of water, the Secretary could act to prevent that result pursuant to the final proviso in Section 7, which provides that "no other appropriation or grant of water by any riparian proprietor shall be authorized or permitted to the damage of any other riparian proprietor." Cf. *United States* v. *McIntire*, 101 F.2d 650, 654 (9th Cir. 1939).

those of the Tribes and the federal government, to support state jurisdiction. In the circumstances presented, we believe that the court of appeals reached a reasonable result. Accordingly—and because of the narrow reach of the holding below, because that holding raises an issue of first impression that has not been adequately explored in the lower courts, and because of the availability of regulatory or other means to accommodate the varying interests involved—review by this Court in the instant case is unnecessary.

3. Finally, the State seeks review (81-421 Pet. 19-21) of the subsidiary issue whether the Tribes have a reserved water right to maintain a fishery in Omak Lake. See 81-421 Pet. App. F-7 to F-10. As the Walton respondents point out, however (81-321 Br. in Opp. 7 n.1), the Ninth Circuit's opinion may be read to do no more than confirm the right of the Tribes to change the use, to fishery purposes, of a portion of their water right reserved for irrigation purposes. This Court has held that such changes in the use of water reserved for an Indian tribe are permissible (*Arizona* v. *California*, 439 U.S. 419, 422 (1979)), and the change in use in the present case would not affect the amount of "excess" water, if any, that would be available for the Walton respondents and subject to the State's asserted regulatory authority. Accordingly, if this aspect of the court of appeals' opinion is read only to permit a change in use of reserved water, it plainly does not warrant review. The scope of the opinion in this regard may be subject to clarification in the course of further proceedings in the courts below.

But even if the decision below is read to recognize an additional reserved water right for maintenance of a fishery in Omak Lake to replace the Tribes' historic fishing grounds on the Columbia River, re-

view by this Court nevertheless is unnecessary at this time. The State characterizes fishing as a "secondary" purpose of the Reservation and argues that under *United States* v. *New Mexico*, 438 U.S. 696 (1978), a reserved water right cannot be implied for such purposes. See 81-421 Pet. 20-21. Both the district court and court of appeals found, however, that the Colville Reservation was set aside as a homeland for the Indians, that a reservation of water sufficient to raise crops and provide food therefore must be implied, and that fish—both salmon and trout—were a traditional source of food for Indians in the State of Washington. 81-421 Pet. App. A-14, F-8 to F-9. See also *Washington* v. *Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. 658, 664-666 (1979); *United States* v. *Winans*, 198 U.S. 371 (1905). The State does not contend that these findings are clearly erroneous. Accordingly, the preservation of the Tribes' ability to fish scarcely can be termed a "secondary" purpose for which the Colville Reservation was established.[17]

The narrower and admittedly novel question presented, then—assuming the court of appeals' opinion is read in the manner the State suggests—is whether a reserved water right may be recognized in the No Name Creek water system for the maintenance of a trout fishery to replace the Tribes' traditional fish-

[17] Because the court of appeals' holding focuses only on the maintenance of the Tribes' traditional access to a fishery, part of the primary purpose for which the Reservation was created, the opinion does not, contrary to the State's assertion (81-421 Pet. 21), broaden the reserved rights doctrine to recognize a reserved right to the use of water for any new purpose that might result in any economic benefit to the Indians on a reservation.

ery in the Columbia River. The State concedes (81-421 Pet. 21) that this issue is one of first impression. Moreover, the discussion in the opinion below is expressly limited to a fishery in the No Name Creek water system. See 81-421 Pet. App. F-9 to F-10.[18] The only practical significance of this issue to the State in the present case therefore could be that recognition of an additional reserved water right for a fishery might diminish the amount of "excess" *non*-reserved water that would be available for appropriation by the Walton respondents and be subject to the State's asserted regulatory authority. But the amount of any such right has not been quantified, so its possible impact on other uses of No Name Creek water is uncertain at this time. Moreover, as explained above (see page 19 and note 14, *supra*), in view of the possibility that additional reserved rights might be recognized for other purposes in the course of further proceedings in this case, it is not clear that there would be any "excess" waters in the No Name Creek water system even if the State is correct that the Tribes do *not* have a reserved water right to maintain the trout fishery in Omak Lake.

Because of the ambiguity, narrow focus, and speculative impact of the opinion below on the fishery question, review by this Court at the present time is unwarranted.

---

[18] Thus, the State is simply wrong in suggesting (81-421 Pet. 21) that the court of appeals has found a reserved water right for fishery purposes that "blankets the entire Colville Reservation, attaching to every stream system that might produce a fishery no matter how small." Other streams on the Colville Reservation, with their different characteristics, are not involved in this case.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General
CAROL E. DINKINS
Assistant Attorney General
ROBERT L. KLARQUIST
BRUCE C. RASHKOW
Attorneys

OCTOBER 1981

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Petitioner's Reply Brief

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Nos. 81-321 and 81-421

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

COLVILLE CONFEDERATED TRIBES, *Petitioners*,

v.

BOYD WALTON, JR., *et ux*, *et al.*, and THE STATE OF WASHINGTON, *Intervenor*, *Respondents*.

UNITED STATES OF AMERICA, *Respondents*,

v.

WILLIAM BOYD WALTON, *et ux*, and THE STATE OF WASHINGTON, *Respondents*.

UNITED STATES OF AMERICA, *Respondents*,

v.

WILLIAM BOYD WALTON, *et ux*, and THE STATE OF WASHINGTON, *Respondents*.

COLVILLE CONFEDERATED TRIBES, *Petitioners*,

v.

BOYD WALTON, JR., *et ux*, *et al.*, and THE STATE OF WASHINGTON, *Respondents*.

UNITED STATES OF AMERICA, *Respondents*,

v.

WILLIAM BOYD WALTON, *et ux*, *et al.*, and THE STATE OF WASHINGTON, *Respondents*.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

REPLY TO BRIEFS IN OPPOSITION OF RESPONDENTS UNITED STATES AND WALTONS

WILLIAM H. VEEDER, *Attorney*
COLVILLE CONFEDERATED TRIBES
Suite 920
818 18th Street, N.W.
Washington, D.C. 20006
(202) 466-3890

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Whether the Petitioners Tribes could be, as Respondents contend, deprived of their right to share in the available supply of water by the transfer of a portion of their reserved rights to non-Indians without express legislation or a clear inference of Congressional intent, Congress having specifically provided by 25 U.S.C. 381 a method "to secure a just and equal distribution" of water "among the Indians residing upon" arid and semi-arid reservations? (No. 81-321, Pet. for Cert. p. 22 *et seq.*

2. Whether the Court of Appeals could *sua sponte*, by alleged equivocal language, constrict its jurisdictional decision to a limited watershed without a specific declaration to that effect, the issue of state jurisdiction over the entire Colville Indian Reservation having been fully tried in the trial court and appeals having been taken from the trial court ruling?

3. Whether the Tribes' rights for agriculture and fishery, having been explicitly declared as separate reserved rights by the Court of Appeals, could be reduced to a single agricultural right, as urged by the Respondents?

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STATUTES:

25 U.S.C. § 381. Irrigation lands; regulation of use of water

"In cases where the use of water for irrigation is necessary to render the lands within any Indian reservation available for agricultural purposes, the Secretary of the Interior is authorized to prescribe such rules and regulations as he may deem necessary to secure a just and equal distribution thereof among the Indians residing upon any such reservations; and no other appropriation or grant of water

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by any riparian proprietor shall be authorized or permitted to the damage of any other riparian proprietor." Feb. 8, 1887, c. 119, § 7, 24 Stat. 390 ..... 2, 3, 5, 6, 7

MISCELLANEOUS:

2A Sutherland, *Statutes and Statutory Construction*, 4th ed., p. 123, § 47.23, "Expressio unius est exclusio alterius"; pp. 4, *et seq.*, § 45.02 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-321

COLVILLE CONFEDERATED TRIBES,
Petitioners,

v.

BOYD WALTON, JR., ET AL.

No. 81-421

STATE OF WASHINGTON,
Petitioner,

v.

UNITED STATES, ET AL.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

REPLY TO BRIEFS IN OPPOSITION OF RESPONDENTS UNITED STATES AND WALTONS

SUMMARY OF REPLY

Reply is made by Petitioners Colville Confederated Tribes to the Briefs in Opposition filed by Respondents United States and the Waltons. Here,[1] as in *United*

[1] See *infra*, p. 4.

States v. Powers,[2] heavily relied upon by Respondents, the interests of the Secretary of the Interior, represented by the Justice Department, are diametrically opposed to those of Petitioners Tribes. It is irresponsible and grossly in error for the Justice Department to represent to the Court that the Tribes are here advancing the same contention that the Justice Department unsuccessfully made in *Powers*.[3]

Main thrust of the Tribes' Petition is that they hold title to invaluable rights to water[4] which, pursuant to 25 U.S.C. 381, assures the "Indians residing" on the Colville Indian Reservation rights to a "just and equal" share of the available water supply which cannot be diminished by transfer to non-Indians. Respondents, in error, vigorously oppose that claim.

Congress has never amended or in any way modified the explicit language of 25 U.S.C. 381. Respondents, in error, cite cases which do not apply to 25 U.S.C. 381 or are wholly *obiter dictum*. Respondents further assert that the issues raised by the Tribes in their Petition are not ripe for resolution. There is no merit to that contention. As stated by the court below:

> This case presents an appropriate vehicle for the Supreme Court to give guidance and stability to an area of great unrest and uncertainty in Western water and land law. A definitive resolution is overdue. The magnitude of the problem cannot be overstated.[5]

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[2] 305 U.S. 527 (1939).

[3] See *infra*, p. 4.

[4] Arizona v. California, 373 U.S. 546, 598-601 (1963); Winters v. United States, 207 U.S. 564, 576 (1908).

[5] No. 81-321, Pet. for Cert., Appendix B, p. 23a, note 18.

ARGUMENT

25 U.S.C. 381 Is Explicit In Its Terms And Limited In Its Application To Indians Residing On Arid And Semi-Arid Reservations

Congress, by 25 U.S.C. 381, Section 7 of the General Allotment Act, declared that the Secretary of Interior is empowered to prescribe rules and regulations which would secure to "the Indians residing upon" arid and semi-arid reservations the right to participate in the available supply of water on the basis of "a just and equal distribution." 25 U.S.C. 381 is explicit. Interpretation of it is not necessary.[6] 25 U.S.C. 381 is not ambiguous. If it were, an interpretation of it would favor the Colville Indians residing on the reservation.[7]

Respondents would have the Court read into 25 U.S.C. 381, as did the court below in plain and serious error,[8] the term "non-Indian."[9] Respondent United States quotes this excerpt from *United States v. Powers*: "[25 U.S.C. 381] clearly indicates Congressional recognition of equal rights among resident Indians."[10] Following that explicit and unavoidable conclusion, the Justice Department for the United States spawns this *non sequitur*:

> . . . the implication [of the last-quoted excerpt] of the Court's decision is that Section 7 [25 U.S.C.

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[6] 2A Sutherland, *Statutes and Statutory Construction*, 4th ed., p. 123, § 47.23, "Expressio unius est exclusio alterius"; pp. 4, *et seq.*, § 45.02. See, No. 81-321, Pet. for Cert., pp. 22, 29.

[7] See, Bryan v. Itasca County, 426 U.S. 373, 392 (1976), quoting Alaska Pacific Fisheries v. United States, 248 U.S. 78, 79 (1918); see, Wilson, v. Omaha, 442 U.S. 653, 666 (1979).

[8] No. 81-321, Pet. for Cert., Appendix B, pp. 15a, *et seq.*

[9] Brief for the United States in Opposition, p. 15.

[10] *Ibid.*, quoting United States v. Powers, 305 U.S. 527, 533 (1939).

> 381] does not bar non-Indians from [obtaining a just and equal share of tribal reserved water]. . . .[11]

Congress alone can vitiate the rights of Indians "residing" on arid and semi-arid reservations. It has not done so.

Powers, In Proper Perspective, Belies Contentions Of Respondents

In *Powers*, the Department of Justice unsuccessfully urged to the Court "That Congress gave the Secretary of the Interior control of Reservation waters." [12] Continuing, it was unsuccessfully urged in *Powers* that the allottee's rights were "subject" to the Secretarial rights asserted by the Department of Justice.[13] Adhering to the same rationale in the Court of Appeals, the Justice Department asserted that the United States held the rights to "all [water] rights" on the reservation and "that no one else—Indian or white" could utilize the water without the consent of the United States.[14] *Powers* was dismissed by the Court of Appeals for want of jurisdiction.[15] The Court "affirmed." [16] Nothing was decided in *Powers* other than the want of jurisdiction. By way of *dictum*—probably in regard to the Crow Treaty, which is not relevant here—the Court declared that:

> We do not consider the extent or precise nature of respondents' rights in the waters.[17]

Both Courts rejected the wholly unsupported contention by the Justice Department that, in some manner, the

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[11] *Ibid.*

[12] United States v. Powers, 305 U.S. 527, 531-32 (1939).

[13] *Ibid.*

[14] United States v. Powers, 94 F.2d 783, 786 (CA 9, 1938).

[15] *Ibid.*

[16] United States v. Powers, 305 U.S. 527, 528 (1939).

[17] *Ibid.*, at 533.

Secretary of Interior had exclusive and plenary power over the waters of the Crow Indian Reservation. It is significant here that exactly the same contention was asserted by the Justice Department.[18]

Hibner,[19] cited by Respondent United States, has no relevancy in these proceedings. 25 U.S.C. 381 pertains to Indians "residing" upon the reservations. In *Hibner*, the lands were *outside* the reservation. Moreover, by a specific act of Congress, the Indians *outside* the reservation were permitted to use the "water" to irrigate lands which were then "actually cultivated . . . so long as said Indians remain where they now live." [20] Most assuredly, the very questionable rule in *Hibner* cannot be extended to the Colville Indian Reservation.[21]

Adair,[22] similar to *Hibner*, has no application here because the lands there involved were outside of any reservation. The Klamath Indian Reservation was terminated almost thirty (30) years ago.[23]

25 U.S.C. 381 was not and could not be applied because, as stated, it relates only to Indians residing within a reservation. Hence, *Adair* has no application in these proceedings. Respondents err in relying upon it.[24]

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[18] See, Appendix A to the Brief, March 6, 1973 letter from Assistant Attorney General to Assistant United States Attorney respecting United States v. Walton and State of Washington, Defendants; Appendix B to this Brief, Complaint, United States v. Walton, asserting the right of the Secretary to allocate water to Respondents non-Indians Waltons.

[19] United States v. Hibner, 27 F.2d 909 (U.S.D.C. Ida. 1928).

[20] *Ibid.*, at 911.

[21] See, Brief for the United States in Opposition, pp. 8, 15, 16.

[22] United States v. Adair, 478 F.Supp. 336 (U.S.D.C. Ore. 1978).

[23] *Ibid.*

[24] Brief for the United States in Opposition, pp. 8, 15, 16; Brief in Opposition of Respondents William Boyd Walton, *et ux*, at p. 13.

Reliance is likewise placed in error by Respondents upon *Ahtanum.*[25] Care was taken in the trial of *Ahtanum* to avoid conflicts between the Indian and non-Indian water users in the Ahtanum Unit of the Wapato Indian Irrigation Project.[26] An *inter sese* adjudication, each water user against the other within the Ahtanum Unit, was neither desired nor necessary. No mention was made by the United States of 25 U.S.C. 381, nor was it applied. The issue of non-Indian rights arose because the non-Indian defendants outside of the reservation sought to invoke the affirmative defenses of statute of limitations and laches against the non-Indians within the reservation. Those claims were rejected by the Court of Appeals because of the interest of the United States in the system partially used by non-Indian defendants within the reservation. The United States petitioned and obtained a decree as to the irrigation system and not in regard to the individual users. Quite obviously, the language of the Court of Appeals in the *Ahtanum* decision was and is *obiter dictum* and reliance should not be placed upon it.[27]

None of the cases, *Powers, Hibner, Adair* or *Ahtanum*, relied upon by Respondents, can properly be considered as authority in regard to 25 U.S.C. 381. None of them considered the explicit language of that Act as it pertains

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[25] United States v. Ahtanum Irr. Dist., Petitioner State of Washington, Intervenor, 236 F.2d 321 (CA 9, 1956); State of Washington, *cert. den.*, 352 U.S. 988 (1956).

[26] *Ibid.*, at 342: "The Government has not taken a definite stand . . . here with respect to . . . successors in interest of the original allottees . . . under the Indian Irrigation ditch."

[27] See, United States v. Ahtanum Irr. Dist., 330 F.2d 897, 915 (CA 9, 1965), providing for a percentage diversion of Ahtanum water to July 10th of each year; thereafter ". . . all the waters of Ahtanum Creek shall be available to, and subject to diversion by, the plaintiff for use on Indian Reservation lands south of Ahtanum Creek . . . ." As stated in the commentary, there was no division of water among the individual users.

to "Indians residing upon" a reservation vis-a-vis non-Indians residing on a reservation. It is an imperative necessity that the long-standing conflicts across western United States on the arid and semi-arid reservations be resolved.

It is also urged by the United States that rules and regulations, involving 25 U.S.C. 381, have been proposed.[28] As the Court observed in *Powers*,[29] the Secretary had not at that time promulgated and issued rules and regulations pursuant to 25 U.S.C. 381. Repeated efforts have failed.

In January 1981, as Respondent United States observes, rules and regulations were proposed. They interpreted 25 U.S.C. 381 as requiring the Indians "residing on the reservation" to share their limited supply of water with non-Indians and to recognize state-created rights. As in the past, the proposed rules invoked a storm of protest, which caused those rules to be declared "dead." It is now declared that the rules and regulations are under active consideration. If implemented, they simply invite contentious litigation. They demonstrate, however, the pressing need to have resolved the issues here presented.

Petitioners Tribes Have Vested Rights Of Fishery Independent And Separate From Their Agricultural Rights

There is no merit in Respondents United States and Waltons seeking to limit the Tribes' rights to agriculture.[30] That contention is contrary to both the trial court's judgment and opinion and the opinions of the Court of Appeals.

Petitioners Tribes' rights of fishery are independent, separate and distinct from their agricultural rights. The

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[28] Brief for the United States in Opposition, p. 21, note 15.

[29] United States v. Powers, 305 U.S. 527, 533 (1939).

[30] Brief for the United States in Opposition, p. 23, para. 3.

separate nature of fishery rights has at all times been recognized. In its Opinion, the trial court referred to the Tribes' claim for rights

> . . . to irrigate the 228 irrigable acres. . . . In addition, the Tribe claims the right to sufficient water to support spawning grounds. . . .[31]

Adhering to the trial court's concept of separate rights of fishery from those of agriculture, the Court of Appeals declared that when the Colville Reservation was created, there was reserved sufficient water for the "irrigable acreage," adding that a land-base agrarian society was not the only thing contemplated when the reservation was created; for, in addition, the right of fishing was likewise included. That right was declared to be "sufficient water" to permit natural spawning of the trout.[32]

Issues Respecting State Jurisdiction And Transferability Of Indian Rights Are Not And Cannot Be Limited To No Name Creek Drainage—They Are Ripe For Disposition

Merit is totally lacking in assertions by Respondents United States and Waltons seeking to limit or otherwise circumscribe the issues presented by Petitioners Tribes. It was the Department of Justice that brought an action against Respondents Waltons and Petitioner State of Washington challenging the State's right to issue permits to appropriate rights to the use of water throughout the Colville Indian Reservation. The trial court declared that: "The State of Washington has jurisdiction over the non-reserved waters *within the Colville Indian Reservation.*" [33] In its Opinion, the trial court stated:

> The Court therefore holds that the State of Washington has jurisdiction over the non-reserved waters within the Colville Reservation. . . .[34]

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[31] No. 81-321, Pet. for Cert., Appendix C, p. 48a.

[32] No. 81-321, Pet. for Cert., Appendix B, pp. 11a, 12a at para. C.

[33] *Ibid.*, at Appendix E, p. 73a, para. V. (Emphasis supplied)

[34] *Ibid.*, at Appendix D, p. 64a.

That issue was appealed. In its Opinion here for review, the Court of Appeals referred to the fact that the state authority "is pre-empted by operation of federal law" and that "Regulation of water on a reservation is critical to the lifestyle of its residents and the development of its resources." [35] Citing the *Pelton* decision, the appellate court referred to the Court's ruling that ". . . a federal reservation is not subject to state regulation absent explicit federal recognition of state authority." [36] The appellate court then cited its own *McIntire* decision and stated: ". . . we held that state water laws are not controlling on an Indian reservation. . . ." [37] It reiterated that concept declaring that:

> Where land is set aside for an Indian reservation, Congress has reserved it for federal, as opposed to state needs. Because the No Name system is located entirely within the reservation, state regulation of some portion of its waters would create the jurisdictional confusion Congress has sought to avoid.[38]

Continuing, the Court of Appeals stated: "Finally, we note that the state's interest in extending its water law to the reservation is limited in this case." [39] Under no circumstances can it be presumed that the Court of Appeals *sua sponte* limited the judgment and opinion of the trial court, which it reversed, to a limited area within the Colville Indian Reservation. Accordingly, there is no merit to the efforts of Respondents to limit the issues respecting state jurisdiction to the No Name Creek watershed.

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[35] *Ibid.*, at Appendix B, pp. 19a and 20a.

[36] *Ibid.*, at p. 21a, citing Federal Power Comm'n. v. Oregon, 349 U.S. 435 (1955).

[37] *Ibid.*, citing United States v. McIntire, 101 F.2d 650, 654 (CA 9, 1939).

[38] *Ibid.*, at p. 23a.

[39] *Ibid.*

Respondents err in seeking to limit the Opinion of the Court of Appeals respecting transferability of Indian rights to the use of the water.[40] The Court of Appeals was explicit—albeit, gravely in error—in holding that: ". . . an Indian allottee may sell his right to reserved water. . . ." to a non-Indian.[41] Respondents misstated the issue of transferability. In error they assert the matter of transferability is before the trial court. That is incorrect. Respondents confuse the issue of transferability with the measure of the allegedly transferred rights.[42] In their Petition, the Tribes deny the transferability of Indian rights and seek here to have the matter resolved. That issue, throughout the Colville Reservation and, indeed, throughout western United States, is now ripe for resolution by the Court.

CONCLUSION

Conjecture and unwarranted speculation permeate Briefs in Opposition.[43] Reality requires an end to the ever-deepening controversies respecting rights to the use of water in western United States. The decision here requested, in the words of the Court of Appeals, is long "overdue." Accordingly, the Petitioners Tribes respectfully pray the Court to grant their Petition for Certiorari and resolve the controversies giving rise to it.

WILLIAM H. VEEDER, *Attorney*
COLVILLE CONFEDERATED TRIBES
Suite 920
818 18th Street, N.W.
Washington, D.C. 20006
(202) 466-3890

November 1981

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[40] Brief for the United States in Opposition, pp. 12, *et seq.*

[41] No. 81-321, Pet. for Cert., Appendix B, p. 16.

[42] Brief for the United States in Opposition, pp. 20, *et seq.*

[43] *Ibid.*, at pp. 14, *et seq.*, notes 7, 8, 10, 11, 13, 14, 15, 16.

APPENDICES

A. March 6, 1973 letter from Assistant Attorney General to Assistant United States Attorney respecting United States v. Walton and State of Washington, Defendants.

B. Complaint, United States v. Walton.

APPENDIX A

March 6, 1973

FLF:DNK
90-2-2-168

AIR MAIL

United States Attorney
Spokane, Washington

Attention: Robert Sweeney, Esquire
Assistant United States Attorney

Dear Sir:

Re: United States of America v. William Boyd Walton, et ux., and State of Washington; Proposed action for protection of Colville Confederated Tribe Water Rights.

There are enclosed an original and five (5) copies of a complaint which seeks to have enjoined the unauthorized diversion and use of water from an unnamed stream on formerly allotted lands within the exterior boundaries of the Colville Indian Reservation and to have a judicial determination of the validity of a permit issued by the State of Washington to non-Indians for the aforementioned use and diversion of water. It is the position of the United States that the Secretary of the Interior has the exclusive jurisdiction to control and administer the allocation of waters on tribal, allotted and formerly allotted lands of the Colville Reservation pursuant to the authority vested in the Secretary under 25 U.S.C. Sec. 381. This allegation is the same as that made in the case entitled *United States* v. *Bel Bay Community*, et al., Civil No. 303-71-C2, USDC Western District of Washington.

As you are aware, now pending in the United States District Court for the Eastern District of Washington

is the case entitled *Colville Confederated Tribe* v. *William Boyd Walton, et ux.*, Civil No. 3421, which addresses the same situation as the proposed suit. By letter dated February 2, 1973, the Department of the Interior requested that we intervene in the aforementioned suit and make the allegations which are now contained in the proposed action. A copy of that letter is enclosed. We have decided, however, not to intervene because the complaint filed on behalf of the Tribe does not, in our opinion, raised the issue which must be addressed to obtain a judicial determination in this controversy *i.e.* the authority of the Secretary of the Interior to determine the allocation of water on Indian Lands.

We are not enclosing a copy of the litigation report provided this office, because the cover letter to that report indicates that you were provided with a copy of the report.

It would be appreciated if you would sign the aforementioned complaint, file it with the Court, and have service made upon the appropriate individuals. If you desire to make any changes in this complaint, to correct errors or to comply with local Court Rules, please feel free to do so. It would be appreciated if you would send us a xerox copy of the complaint as filed with the Court stamped showing the time of filing for our records.

Sincerely,

KENT FRIZZELL
Assistant Attorney General
Land and Natural
Resources Division

By:

FLOYD L. FRANCE
Chief,
General Litigation Section

Enclosures

cc: Mitchell Melich, Esquire
Solicitor
Department of the Interior
Washington, D.C. 20240

Attention: William A. Gershuny, Esquire
Associate Solicitor
Division of Indian Affairs

APPENDIX B

DEAN C. SMITH, Esquire
United States Attorney

ROBERT M. SWEENEY, Esquire
Assistant United States Attorney
581 United States Court House
P.O. Box 1494
Spokane, Washington 99210
Telephone Number (509) 456-3811

DOUGLAS N. KING, Esquire
Attorney
Department of Justice
Land and Natural Resources
Division Washington, D.C. 20530
Telephone Number (202) 739-2724

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

No. 3831

UNITED STATES OF AMERICA,
Plaintiff,

v.

WILLIAM BOYD WALTON and
KENNA JEANNE WALTON, his wife,
and the STATE OF WASHINGTON,
Defendants.

[Filed March 15, 1973]

COMPLAINT

I

The Jurisdiction of this Court is invoked under 28 U.S.C. Section 1345.

II

In the present action, the United States seeks in its own right and on behalf of the Colville Confederated Tribes, to have enjoined the unauthorized diversion and the use of waters of an unnamed creek, which flows across Sections 16, 21 and 28 in Township 33 N. Range 27 East, Washington Meridan, a tributary of Omak Lake, and is located entirely within the external boundaries of the Colville Indian Reservation. Defendants also seek to have a judicial determination of the validity of a permit issued by the State of Washington, to Wilson W. Walton to divert water from the aforementioned unnamed creek for use within the exterior boundaries of the Colville Indian Reservation.

III

The Colville Indian Reservation was established by executive order of July 2, 1872.

IV

The following described lands located within the external boundaries of the Colville Indian Reservation, and transversed by the aforementioned unnamed creek were originally allotted to members of the Colville Confederated Tribes. These allotments are described as follows:

(1) Allotment S-2371
E1/2 SW1/4 and W1/2 W1/2 W1/2 SE1/4, Sec. 21 T. 33, R. 27 E., W.M.

(2) Allotment S-894
E1/2 W1/2 SW1/4 SE1/4, E1/2 SW1/4 SE1/4 and SE1/4 SE1/4, Sec. 21, and W1/2 NE1/4, Sec. 28, T. 33, R. 27 E., W.M.

(3) Allotment S-525
W1/2 W1/2 W1/2 NE1/4 and E1/2 NW1/4, Sec. 21, T. 33 N., R. 27 E., W.M.

Allotment S-2371 left trust status on April 28, 1921; Allotment S-894 left trust status on May 10, 1923; and Allotment S-525 left trust status on August 10, 1925. On information and belief, it is alleged that defendants William Boyd Walton and Kenna Jeanne Walton, husband and wife, are the present fee owners of these formerly allotted lands.

V

On August 25, 1950, the State of Washington, acting through the State Supervisor of Hydraulics, issued a Certificate of Surface Water Rights to Wilson W. Walton of Omak, Washington which purported to grant a right to the use of one (1) cubic foot of water per second from an unnamed creek which flows across Sections 16, 21 and 28 Township 33 N. Range 27 East, Washington Meridian, a tributary of Omak Lake and located within the external boundaries of the Colville Indian Reservation for the purpose of irrigating 65 acres of land within the following described tract:

> E1/2 NW1/4; W1/2 of W1/2 of NE1/4 of E1/2 of SW1/4; W1/2 of W1/2 of W1/2 SE1/4; E1/2 of W1/2 of SW1/4 of SE1/4; E1/2 of SW1/4 of SE1/4 and SE1/4 of Sec. 21, T. 33 N., R. 27 E., W.M.

All of the lands described in this paragraph are formerly allotted trust lands of the Colville Indian Reservation and are portions of the allotments described in paragraph IV.

VI

On information and belief, it is alleged that defendants William Boyd Walton and Kenna Jeanne Walton presently divert water from the aforementioned unnamed creek under the authority of the permit described in paragraph V.

VII

The State of Washington was without authority to grant the permit described in paragraph V because jurisdiction to distribute and administer the waters within the Colville Indian Reservation is soley within the jurisdiction of the United States of America and the Colville Confederated Tribe.

VIII

If defendants William Boyd Walton and Kenna Jeanne Walton continue to divert water from the aforementioned unnamed creek in the amount purportedly authorized by the permit from the State of Washington, individual Indians of the Colville Confederated Tribes as well as the Colville Confederated Tribe will suffer irreparable harm, to wit:

(1) Defendant Walton's diversion of water prevents irrigation on down stream allotments and tribal lands which result in a loss of productivity and value as well as preventing the irrigation of the Omache Lake Resort grounds.

(2) The continued diversions threaten the present fishery in Omak Lake, one of the few known sources of pathogen free Lahontan Cutthroat trout eggs.

(3) These diversions have destroyed the fishery in the unnamed creek below Walton's diversion facilities.

(4) The continued diversion has and will continue to contribute to the decline of the water level of Omak Lake, which causes an increase in the mineral content of the Lake and reduces the opportunity for development of recreational facilities on the Lake.

Wherefore, plaintiff prays judgment against defendants as follows:

(1) that the defendants William Boyd Walton and Kenna Jeanne Walton be enjoined from diverting

water from the aforementioned unnamed creek flowing into Omak Lake in any amount of excess of that authorized by the Secretary of the Interior.

(2) For a judicial determination that the permit issued by the State of Washington to divert water from the unnamed creek flowing into the Omak Lake is void and of no force or effect.

(3) For an order enjoining the defendant State of Washington from issuing any permits for the appropriation or pumping of water from lands within the exterior boundaries of the Colville Indian Reservation.

(4) For costs of suit.

(5) For such other and further relief as the Court deems proper.

Respectfully submitted,

/s/ Dean C. Smith
DEAN C. SMITH, Esquire
United States Attorney

/s/ Robert M. Sweeney
ROBERT M. SWEENEY, Esquire
Assistant United States Attorney

/s/ Douglas N. King
DOUGLAS N. KING
Attorney

Attorneys for Plaintiff.